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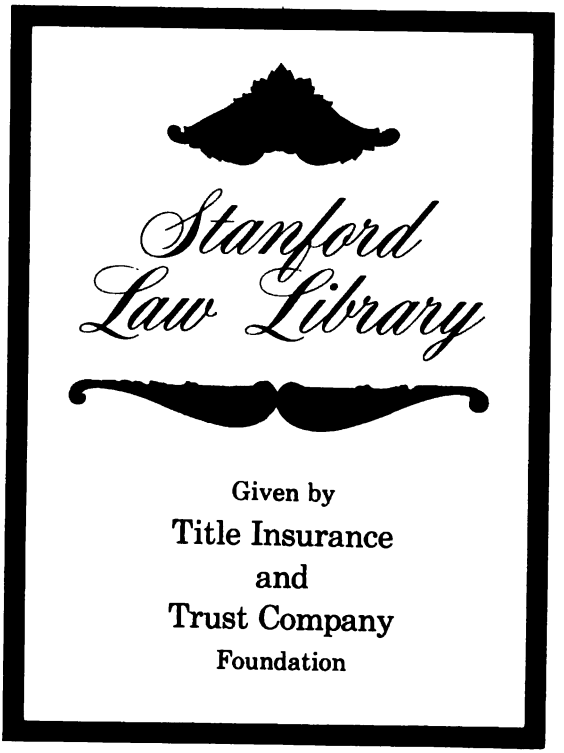
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able, as well to them as to the profession at large.

While, on the one hand, the facilities of self-defence, afforded by a prompt and efficacious exercise of the rights of Lien and Stoppage in Transitu, have not unfrequently been the means of preventing the most calamitous losses to parties; so, on the other hand, the experience of numberless instances has taught us what serious and burthensome expenses in futile litigation have too often resulted from an irregular recourse to these powers.

With a view, therefore, to supply the want of a complete compendium of the law bearing upon the subject, I have been induced to attempt the compilation of the following Treatise. The many emergencies that necessarily occur in the wide and complicated transactions of commerce, when resort is required to the peculiar remedies of Lien and Stoppage in Transitu, before competent legal advice can be obtained, afford me reasonable ground to hope that an endeavour to explain the nature and extent of these remedies will not be considered entirely unavailing; and if, by simplicity of arrangement, or facility of reference, I have suc-

ceeded in rendering this important branch of the law more readily comprehended, I shall feel amply compensated for any labour or anxiety bestowed upon the attempt.

During the progress of the work, I have been induced, not unreluctantly, to embody in its pages that branch of the doctrine of lien, of which the Courts of Equity peculiarly entertain cognizance. With this object, I have endeavoured to define the operation of lien upon real estate—whether arising by statutory enactment, in the nature of judgments, *lis pendens*, and crown debts—or by voluntary creation, as instanced in the deposit of title-deeds—or, by implication, in the nature of trusts, arising under devises or settlements, or attaching on behalf of unpaid vendors, for the amount of purchase-money. I have thus been led into the discussion of a variety of matter unconnected with that portion of the subject which appertains more intimately to the mercantile community; and though I cannot indulge the hope that I have afforded, in so limited a space, more than a cursory glimpse of the general and leading features of this equitable doctrine, I would yet fain hope that the inquiry may be deemed of

sufficient importance and utility to justify and compensate for the consequently protracted length to which I have been compelled to extend my observations.

J. C.

5, Hare Court, Temple,
Oct. 1st, 1840.

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DISTINCTIVE PRINCIPLES

OF

Lien and Stoppage in Transitu.

CHAPTER I.

Stoppage in transitu.

THE right of stopping goods *in transitu*, or, in other words, of resuming possession of them by a vendor or consignor, before they reach the hands of the vendee or consignee, is a purely equitable privilege pertaining to such vendor or consignor, so long as the price of the goods remains unpaid, and the legal title continues in those parties (1). Till delivery, or actual payment, or some act equivalent to actual transfer of the possession of the goods, the law considers the contract ambulatory; and in case of the insolvency of the vendee meanwhile, empowers the vendor to resort to detainer of them, in order to secure to himself the payment of the price.

Founded on equitable principles, and originally established in the courts of equity, this doctrine has however been since as fully recognised and adopted in the courts of law (2). The power of re-seizure determines with the delivery of the goods, and there are no instances

(1) See *Lickbarrow* v. *Mason*, 2 Term Rep. 63; and in error, 6 East, 19, where Buller, J., clearly and elaborately defines the principles and distinctive rights of lien and stoppage *in transitu*.

(2) *Edwards* v. *Brewer*, 2 Mee. & W. 377.

in which a vendor or consignor, having once actually parted with the legal ownership, has been suffered to re-take them, in opposition to a vendee or consignee, who has obtained a legal title.

Lien.

The right of lien, on the other hand, is a strict and entire common law right, existing, as a general rule, in those cases only where actual or constructive possession of goods is in the party claiming to exercise it. If the possession be parted with after the lien attaches (except in some instances, which will be enumerated elsewhere, where by the usage of trade or agreement, a lien for general demands is permitted), subsequent repossession will not revest the lien for the particular claim in respect of which it was originally exerciseable.

"A lien," Dr. Story observes (1), "is not, in strictness, either a *jus in re*, or a *jus ad rem*, but simply a right to possess and retain property, until some charge attaching to it is paid or discharged. It generally exists in favour of artisans and others, who have bestowed labour and service on the property, in its repair, improvement, and preservation. It has also an existence in many other cases, by the usages of trade, and in maritime transactions, as in cases of salvage and general average. It is often created and sustained in equity, where it is unknown at law, as in cases of the sale of lands, where a lien exists for the unpaid purchase-money. It is not confined to mere cases of labour and services on the very property, or connected therewith, but it is often, by the usage of trade, extended to cases of a general balance of accounts in favour of factors and others."

The origin of the right of lien has been ascribed to the Roman law, which recognised in a vendee no actual title or dominion by the mere sale, unless payment or satisfaction were made, or security given for the price, excluding the notion of a lien. "*Quod vendidi, non aliter*

(1) See Treat. on Equity.

fit accipientis, quam si aut pretium nobis solutum fit, aut satis eo nomine factum, vel etiam fidem habuerimus emptori sine ullâ satisfactione (1)." Thus far the Roman law was co-extensive only with the acknowledged rights of vendors in this country, whether by the exercise of lien on those articles of which possession has not been taken, either actually or constructively, by the vendee, or by that of stoppage *in transitu*, where the goods are in transit but have not reached his hands. It, however, vested in a vendor a right of seizure, after delivery to a vendee, or even after a subsequent sub-sale, while in the possession of a second vendee, if payment of the price was not duly made. In our law, when a man sells goods, he sells them on the credit of the buyer; and if he deliver the goods, the property is altered, and he cannot recover them back again, though the vendee immediately becomes bankrupt (2). The right of the vendor, while the goods continue in his possession, is that of lien; but when the delivery is to be at a distant place, and the goods are in actual transit, his right is that of stoppage *in transitu*. "I state it to be a clear proposition," observed Lord Longhborough (3), "that the vendor of goods not paid for, may retain the possession against the vendee, not by aid of any equity, but on grounds of law. Our oldest books (4) consider the payment of the price (day not being given) as a condition precedent, implied in the contract of sale; and that the vendee cannot take the goods, nor sue for them, without tender of the price. If day has been given for payment, and the vendee can support an action of trover against the vendor, the price unpaid must be deducted from the damages, in the same manner as if he brought his action on the contract for the non-

(1) Dig. Lib. 18, tit. 1, 1, 19; Story on Eq. vol. 2, p. 469.
(2) *Lickbarrow* v. *Mason*, 2 T. R. 63; 1 H. Bl. 357; 6 East, 21.
(3) *Mason* v. *Lickbarrow*, in error.
(4) See Hob. 41, and the Year Book there cited.

delivery (1). The sale is not executed before delivery; and in the simplicity of former times, a delivery into the actual possession of the vendee or his servant, was always supposed. In the variety and extent of dealing, which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee. A destination of the goods by the vendor to the use of the vendee; the marking them or making them up to be delivered; the removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested, till the goods have come into the possession of the vendee. He has, therefore, a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu*."

The essential foundation of the right of lien, as observed, is possession; that of stoppage *in transitu*, non-delivery to the vendee. In other words, the one empowers a right of detention, so long as the vendor has not relinquished possession of the goods; and the other, an extended right of resuming possession even where he has parted with the goods, at any time before they reach the hands of the vendee.

There are, it is true, particular instances in which the required possession is dispensed with, in the exercise of the right of lien, as in maritime liens such as for seamen's wages, and on bottomry bonds; so, also, where the possession is constructively in the party claiming the lien, by the agency of a third person. The courts of equity and statutory enactment have also allowed the exercise of the right of lien in numerous instances, where, from the nature of the transaction, possession must necessarily

(1) *Snee* v. *Prescot*, 1 Atk. 245.

have ceased. Of this nature is the lien on real estate for the amount of purchase-money—the lien of judgment, and implied lien in cases of trust, and various others that are hereafter discussed.

Thus, a lien has been decreed upon the inheritance of an estate in the West Indies, after the death of the tenant for life, who has supplied it with necessaries. And allowance has been decreed in respect of advances for such supplies by persons acting as consignees, not under a regular appointment, but with permission of the owners, or by one tenant in common; if not upon the ground of lien by the colonial law or usage, upon the nature of the subject requiring expenditure, as in the case of mines, allum works, &c., distinguished from a mere landed estate in this country (1).

There are, however, few exceptions to the general and guiding rule at law, and these will be treated of, and more fully defined in their proper place.

The right of stoppage *in transitu*, on the other hand, accruing, as the term denotes, after possession has been parted with, depends for its existence on the ambulatory nature of the contract, and though an extension of, and of later origin than, the right of lien, is of less general application. "It is not," observed Mr. Justice Bayley (2), "a mere lien, which a vendor will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering them, the vendee is immediately entitled to the possession, and the right of possession, and the right of property, vest in him at once; but his right of possession is not absolute; it is liable to be defeated if he become insolvent before he obtains possession. To exercise the right of stoppage *in transitu*, the party claiming it must

(1) *Scott* v. *Nesbit*, 14 Ves. J. 438.

(2) *Bloxam* v. *Sanders*, 4 B. & C. 948; 7 D. & R. 396.

either be substantially the owner of the goods, or acting in the character of vendor, and the claim in respect of which the seizure is made, must be limited to the unpaid price of the particular goods. Such character and such limitation are not essential to the exercise of the power of lien, for others, it has been shown, besides vendors, possess this right, and in many cases, may exercise it for the recovery of a general demand, arising out of prior transactions.

What constitutes the requisite ownership, whether as vendor, consignor, or agent, and what the transitus, during which the privilege of resuming possession of goods sold may be exercised, are subjects for after discussion, when treating on the particular nature, rights, and incidents of stoppage *in transitu*.

Since mercantile transactions have formed so prominent a feature in the affairs of this country, which owes, as has been remarked, the great advantage it possesses over most, if not all other parts of the known world, in point of foreign trade, to the extent of credit given on exports, and the ready advances made on imports, it has been the object of the courts to adopt some clear and definite principles for the decision of questions of this nature. Instead, therefore, of throwing all the evidence together, and leaving all the circumstances of the case generally to the jury, thereby deciding individually, as it were, according to the facts and features of each separate case, the great study has been to find some certain general principles which shall be known to all mankind, not only to rule the particular case under consideration, but to serve as a guide for the future (1).

In defining these principles, and in commenting on the respective rights of lien and stoppage *in transitu*, I may perhaps render the subject more clear and intelligible,

(1) Per Buller, J., *Mason* v. *Lickbarrow*, in error, 6 East, 19.

by confining my observations, in the first place, to the existing law of lien; and by devoting a separate portion of the treatise to the law as it applies to stoppage *in transitu*. With this view I propose, therefore, first,—to state the general nature and incidents of lien, and to point out the decisions particularly bearing upon this subject; and secondly,—the specific remedies and privileges of parties in respect of goods *in transitu*.

CHAPTER II.

GENERAL NATURE AND INCIDENTS OF LIEN.

Right of lien a frequent defence at common law.

THE right of lien constitutes a valid and frequent defence at common law, and is founded on principles of commercial policy and convenience, with which it would be not less dangerous than impolitic to interfere. Its practical importance is demonstrated by the numerous cases in which such right is called into action; and when we consider the fluctuation of commerce, and the extreme danger and risk to which merchants and traders generally would be subjected, by the sudden insolvency of their customers and correspondents, were it not that the law has recognised a safeguard of this nature, we cannot but rejoice, that the decisions upon the subject have enabled us to arrive at some definite and intelligible principle for our guidance and direction.

Right of lien and set-off in some respects analogous.

An analogy has been attempted to be drawn between the respective rights of lien and set-off, and these rights are certainly so far analogous, that the effect of each is to prevent circuity of action; an inconvenience against which partial provision only was made by the common law, in the allowance of the former right (1).

(1) Whit. on Lien, p. 2.

In order to elucidate more particularly the subject immediately under discussion, it may not, perhaps, be out of place to explain as concisely as possible the origin of set-off, its nature, and the distinction between that right and the common law privilege of lien.

Right of set-off defined.

The right of set-off is a statutable right, and may be pleaded in all cases of mutual credit, or where mutual debts are due between the respective parties to a suit. "Natural equity says, that cross demands shall compensate each other, by deducting the less sum from the greater, and that the difference is the only sum that can be justly due" (1).

It is, indeed, but a principle of common reason and justice, that when two parties are mutually indebted, the balance only shall be paid; and that one of the parties shall not be compellable to pay the debt which he has incurred, and be left to sue for that to which he is entitled. Such principle forms an essential part of the civil law; and the effect of mutual debts, in thus destroying each other, is distinguished by the term *compensation;* the extinction or reduction of the one debt ensuing immediately, and by operation of law, upon the other being contracted (2).

Formerly the right of set-off not available as a defence.

Formerly, however, this equitable principle of set-off was not available as a defence at law. For the sake of the forms of proceeding, and for the convenience of trial, both parties were under the necessity of suing for, and recovering separately, their respective demands. By the common law of England, though a plaintiff was indebted to a defendant in as much, or even more, than the defendant was indebted to him, it afforded no answer to an action. He was obliged, in the first instance, to satisfy the plaintiff's demand, and then to resort to a separate action for the recovery of his own.

(1) Per Lord Mansfield, *Green* v. *Farmer*, 4 Burr. 2220; 1 Bl. 651.
(2) See Appendix, Pothier's Treatise on Obligations.

Statutes allowing mutual debts to be set off in cases of bankruptcy.

To remedy the glaring inconvenience and injustice resulting from the circuitous mode of procedure that was necessary to be adopted in the recovery of cross-demands, various legislative enactments were, at different times, passed, to enable parties to set off their mutual claims against each other. The first statute which recognised this power was the 4 & 5 Anne, c. 17; then followed a temporary statute, 5 Geo. 1, c. 11, and subsequently the 5 Geo. 2, c. 30, and the 46 Geo. 3, c. 135, each being however confined in its operation to cases of bankruptcy. The salutary effect of these statutes was perceptibly felt. Assignees of a bankrupt could no longer sue for, and recover from a debtor to the estate, any sum except the balance of accounts between the parties. The debt of one might be set off against the debt of the other, notwithstanding any prior act of bankruptcy committed by the bankrupt before the credit was given to, or the debt contracted by him, provided such credit was given two calendar months before the date and suing forth of the commission, and that the person claiming the benefit of the set-off had no notice of any prior act of bankruptcy committed by the bankrupt, or that he was insolvent or had stopped payment. Thus the law remained till the passing of the 6 Geo. 4, c. 16, for the amendment of the laws relating to bankrupts, which repeals the former statute, and contains a provision similar in effect, but more extensive in its application, than those already referred to. By this statute, the balance of accounts is in like manner rendered the only sum claimable by either party, but the period within which the credit shall have been given, or the debt contracted, is extended to the issuing of the commission, provided the person claiming the set-off in respect of such credit or debt, had not at the time notice of any act of bankruptcy, or of the trader being insolvent, or having stopped payment (1).

(1) 6 Geo. 4, c. 16, s. 50, enacts, in these words:—"Where there has

Statutes of set-off in general cases.

This beneficial provision in case of bankruptcy was soon more generally applied, by the 2 Geo. 2, c. 22, which was followed by the perpetual statute, 8 Geo. 2, c. 24, enabling defendants, in all cases, to set off debts due to themselves, against those for which they were sued.

The law as it now stands gives, it is seen, in case of bankruptcy, the right of set-off where there are mutual debts, or has been mutual credit, but in all other cases it is confined to claims in the nature of a debt, "reduced or reducible to a certain or specific pecuniary amount, and recoverable in an action *ex contractu*, as assumpsit, debt, or covenant" (1).

Statutory provisions confined to pecuniary demands.

These statutes effectually removed the inconvenience resulting from the former circuitous mode of action for the recovery of debts, and the plea of set-off soon became one of the most frequent defences on record—still their provisions did not extend to goods, or other specific articles wrongfully detained, and except so far as they could be construed as a pledge, a defendant was unable to call upon a plaintiff to pay what might happen to be due

been *mutual credit* given by the bankrupt and any other person, or where there are *mutual debts* between the bankrupt and any person, the commissioners shall state the account between them, and one debt *or demand* may be set against another, notwithstanding any prior act of bankruptcy committed by such bankrupt, before the credit given to, or the debt contracted by him, and what shall appear due on either side, on the balance of such account, and no more, shall be claimed or paid on either side respectively; and every debt or demand hereby made provable against the estate of the bankrupt, may also be set off, in manner aforesaid, against such estate; provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed."

But, before these statutes, when the nature of the employment, transaction, or dealing, necessarily constituted an account consisting of receipts and payments, debts and credits, the balance only was considered as the debt, and could only be recovered. *Green* v. *Farmer*, 4 Burr. 2220.

(1) Chit. on Contracts, 658.

upon them, for the statutes applied only to the *pecuniary* claims of the several parties.

Courts recognised lien in case of bankruptcy on principle of mutual credit.

The courts, however, by an extended and liberal construction of the meaning of *mutual credit*, soon effected substantial and equitable relief in favour of creditors holding the goods of bankrupts, either by viewing the transaction as one of account current between the creditors and bankrupts, or, where the goods were already in pledge for part of a debt, by deeming such pledge upon the like principle, as security for the residue (1). "It would indeed have been a hardship," observed the Lord Chancellor, in *ex parte Deeze*, 1 Atk. 228, "to have said that mutual credit should be confined to pecuniary demands, and that if a man had goods in his hands belonging to a debtor of his, which could not be got from him without an action at law, or bill in equity, that it should not be considered as mutual credit." In all instances, therefore, where the circumstances of the case were such, that prior usage, implied or actual agreement between the parties, or mutual credit and account, could be inferred, the courts extended their protection in behalf of creditors holding the goods of their debtors. "Convenience of commerce and natural justice," as observed by Lord Mansfield (2), "are on the side of liens," and nothing would exceed the hardship to which parties would, at all times, be subjected, if compelled to restore the goods of a debtor, without enforcing previous satisfaction of any debt due to them.

Plea of lien.

The recognition of the plea of lien is of universal importance; and daily practice shows how frequently it is advanced as a defence in actions for *torts*, as well as in

(1) See *Demaindray* v. *Metcalf*, 2 Vern. 691; and *Chapman* v. *Darby*, 2 Vern. 117; where this doctrine had been recognised by the courts, even before the statute of Anne; and see *Jones* v. *Smith*, 2 Ves. J., 378; *Adams* v. *Claxton*, 6 Ves. J., 229; *ex parte Langston*, 17 Ves. J., 231.

(2) *Green* v. *Farmer*, 4 Burr. 2220; 1 Bl. 651.

actions of *assumpsit*, for the recovery of specific goods, as well as money. Hence arises an important distinction between the relative rights of lien and set-off, for by the common law, a set-off is not pleadable in reduction of any claim without express agreement, and the statutes of set-off allow it only in actions *ex contractu*, and not in actions for *tort* (1).

Distinction between set-off and lien.

Another distinction between these rights exists also in this respect, that the pecuniary debt which the statutes allow to be set off by one party against the other, is either of a smaller amount than that sought to be recovered, or precisely the same, and the recovery of the residue, if the original set-off exceeds the sum for which a defendant is sued, must be effected by a separate action (2); while, on the other hand, goods or specific articles to any value, considered by law a pledge in the hands of a creditor, may be detained till satisfaction of his claim, however disproportionate in amount.

Set-off can be pleaded only to an amount smaller than, or equal to, debt sued for, but lien exists on security to any amount.

A third distinction is this: a claim of set-off is not pleadable in answer to an action, if the debt, in respect of which such set-off arises, has been barred by the statute of limitations. The legal remedy for the recovery of the sum as a substantive debt being defeated, it follows necessarily, that the defendant cannot rely upon

Set-off not pleadable, if barred by stat. of limitations; but goods may be detained as lien notwithstanding.

(1) *Laycock* v. *Taffrell*, 2 Chit, 531; *Lapeford* v. *Fletcher*, 4 Term. Rep. 511.

(2) The effect of a plea of set-off is the same in actions of assumpsit and debt on simple contract. The defendant is entitled to prove under this plea as much as he can to be due to himself, which, though smaller than the plaintiff's claim, may be taken *in connexion with* other pleas, as an answer to the plaintiff's case. But when a defendant under a plea of set-off to the whole declaration, proves a sum of money owing to him from the plaintiff less than the amount of the claim which the plaintiff has established, he is not entitled to have a verdict entered for him on that issue for the amount which he has so proved, but the issue must be found for the plaintiff; unless all the pleas together cover the whole cause of action. *Tuck* v. *Tuck*, 5 Mee. & W. 109; and see *Moore* v. *Butlin*, 7 Ad. & Ell. 595; 2 Nev. & P. 436; *Cousins* v. *Paddon*, 2 C. M. & R. 547.

it as an answer to the legal claim for which he is sued (1). The statute of limitations may, however, have run against a demand, yet, if a creditor obtain possession of goods, on which he has a lien for a general balance, he may hold them for that demand by virtue of such lien, for the debt is not discharged or extinguished, but the remedy by action only (2).

Lien cannot be maintained after debt for which it is security is paid; but set-off includes all mutual debts in the same right.

Again, there is this distinction between the two rights, that lien attaches upon the specific property upon which it is deemed a security so long only as the particular debt, in respect of which it is claimed, remains unpaid; and though other debts be due from the owner of the property, they will, in general, vest no extended right of detainer; while, on the other hand, the right of set-off embraces all debts mutually due in the same right.

It frequently happens that in each case the remedy is insufficient to accomplish a final and satisfactory settlement. In the one, the security may be relinquished

(1) *Remington* v. *Stevens*, Str. 1271.

(2) *Spears* v. *Hartley*, 3 Esp. Rep. 81; *Higgins* v. *Scot*, 2 B. & Ad. 413. The statute 21 Jac. 1, c. 16, s. 3, (regulating the limitation as to personal actions), enacts, "That all actions of account, and upon the case (other than such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants), and all actions of debt grounded upon any lending or contract, without specialty, and all actions of debt for arrearages of rent, shall be commenced and sued within six years next after the cause of such action or suit, and not after."

The stat. 3 & 4 Will. 4, c. 27, s. 40, enacts, "That no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, *or lien*, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his agent: and in such case no such action, or suit, or proceeding, shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given."

during the existence of further claims against the owner of the property, and in the other, the power of set-off not admitting a demand larger than the debt sued for, may compel the party exercising it, to adopt ulterior steps for the recovery of the residue of his claim.

Mutual credit.

The statute relating to mutual credit between bankrupts and others, alone admits of complete justice being done to both parties in the same suit, in every case to which it extends, for it provides, that the account shall be stated, and the balance paid on whichever side it may be due, whether to the plaintiff, or to the defendant(1).

Right of lien and set-off may be co-existent, yet set-off is not pleadable in answer to lien.

The right of lien on the one part, and the right of set-off on the other, may also be co-existent, yet the latter cannot be pleaded in answer to the lien without a specific agreement between the parties, that the one debt shall be set off against the other. Under such agreement, the set-off may be construed as a payment, so as to extinguish the debt for which the lien arises, but not otherwise. The parties, it is true, have, in such case, mutual claims against each other; but there is this difference, that one claims the advantage of a security for his debt, which the other has not; and unless there be a specific agreement to that effect, it would be unreasonable that he should be deprived of the benefit of his lien(2).

Having thus far adverted to the distinctive rights of lien and set-off, I shall now proceed to point out the different species of lien, and the circumstances under which the right to each may be acquired and exercised.

Two denominations of lien—general and specific lien.

There are two denominations of lien—the one a *particular or specific lien*, given by the policy of the common law, and the custom of the realm, and attaching only upon the specific chattels, for the unpaid price, or car-

(1) Whit. on Lien, p. 6.

(2) *Pinnock* v. *Harrison*, 1 Horn & Hurl. 114; 3 Mee. & W. 532, *S. C.*; and see *Clarke* v. *Fell*, 1 Nev. & M. 244.

riage thereof, or for the work and labour bestowed thereupon;—the other, a *general lien*, empowering detention of the goods, not only for demands arising out of the article retained, but for a general balance of accounts, relating to dealings of a like nature. "The latter," as observed by Lord Ellenborough, C. J., (1) "is an encroachment upon the common law," and is consequently regarded by the courts with an eye of extreme jealousy. Hence, in the absence of some general usage affecting the custom of the realm—an express agreement between the contracting parties—or evidence to show that such was their common mode of previous dealing, the courts discourage further extension of such general privilege, and a jury is warranted in negativing any right beyond the specific lien to which parties are entitled at common law.

General lien, depending on usage, must be proved by numerous and ancient instances.

To establish a general lien, on the ground of usage, strong and satisfactory evidence must be adduced of ancient, numerous, and important instances, in which the right has been exercised. When the usage is general, and prevails to such an extent that all parties contracting may be supposed conusant of it, they will, of necessity, be bound by the custom (2); for the usage of trade amounts to evidence of contract; and where such usage is general, and has been so long established as to afford a presumption of its being commonly known, it is only fair to conclude that the parties contracted with reference to it (3). The uniformity and frequency of the instances of such usage are facts, upon which a jury may be called to infer a generally-acknowledged and recognised mode of dealing.

On the other hand, recent or particular instances of Recent in-

(1) *Rushforth* v. *Hadfield*, 7 East, 229.

(2) *Holderness* v. *Collinson*, 7 B. & C. 212; 1 Man. & R. 55.

(3) *Rushforth* v. *Hadfield*, 6 East, 518; *Bleaden* v. *Hancock*, 4 Car. & P. 156.

stances not sufficient to warrant a general usage.

detention will not warrant the conclusion of general usage, for it is supposed to have been founded on contracts repeated so frequently, and so notorious, that every body must be considered as bound to take notice of it(1). The instances in which this usage has been established are by no means numerous, and the right therefore of general lien is confined to comparatively few trades.

Inconvenience of general liens.

General liens, it has been observed, are a great inconvenience to the bulk of the trading community, because they give a particular advantage to certain individuals who claim to themselves a special privilege against the body of creditors at large, instead of coming in with them for an equal share of the insolvent's estate. All these general liens infringe upon the system of the bankrupt laws, the object of which is to distribute the debtor's estate proportionally amongst all the creditors, and they ought not to be encouraged(2). Yet there are some traders to whom the law has reasonably allowed this apparent advantage over others; and it might not, indeed, have seemed contrary to stric justice, that an extension of the right should have been granted in all cases where a subject of the realm has the power of compelling a trader to receive goods for the purposes of trade, without any right, on the part of the latter, of compelling the condition of general lien. This legal obligation to exercise their trade when requested, as in the case of common carriers, and farriers; or, in the case of an innkeeper, to receive a guest, if required, has vested in them a particular lien upon the specific goods entrusted to them, in the one case, and upon the property of the guest in the other, for the particular work done, or entertainment and necessaries supplied; but the right to a more extensive lien has, notwithstanding, been denied, except when supported by the required testimony

(1) *Oppenheim* v. *Russel*, 3 Bos. & Pul. 50.

(2) Per Le Blanc, J., in *Rushforth* v. *Hadfield*, 6 East, 528.

of unvaried usage. Accordingly, where a common carrier attempted to set up a lien for his general balance, upon proof of one instance of the exercise of the right by a person engaged in the same trade, so far back as thirty years, accompanied by many other instances, which were either attended by circumstances which might have rendered it not worth the while of the parties against whom they were exercised, to dispute the claim, or had taken place within a recent period, and were not brought home to the knowledge of the person against whom the lien, in that instance, was claimed; the jury negatived the usage, and the court refused to grant a new trial (1).

General lien by custom becomes the law of the land.

If the right to insist upon a general lien has been frequently established by evidence, the custom becomes part of the law of the land, and the courts will not afterwards permit it to be disputed (2). So, the usage of trade constitutes a recognised principle of law, and the law adopts it upon this plain understanding, that where there is a prevalent and universal course and usage of trade, all mankind are deemed to contract upon the scale, footing, and foundation of that established course and practice (3).

Lien by agreement, &c., decided alike at law and in equity.

This right, whether founded on agreement, or other arrangement by which an inference of such intention can be raised, is decided on the same grounds both at law and in equity (4). So, the resulting effect of an agreement, whether arising by implication, or entered into upon expressed and defined terms, is precisely alike. The only difference, as observed by Lord Tenterden, between an express and an implied contract is in the mode of substantiating it. An express contract is proved by

(1) *Rushforth* v. *Hadfield*, 6 East, 518.

(2) *Naylor* v. *Mangles*, 1 Esp. 109; *Spears* v. *Hartley*, 3 Esp. 81.

(3) *Rex* v. *Humphery*, 1 M'Clel. & Y. 191.

(4) *Gladstone* v. *Birley*, 2 Mer. 404; *Oxenham* v. *Esdaile*, 2. Y. & J. 493.

an actual agreement; an implied contract by circumstances, and the general course of dealing between the parties (1); but in effect they are identical.

General lien by custom,

Must be reasonable.

In attempting to establish a right of general lien founded on ancient usage, it is also requisite to show that the custom is reasonable. Thus where, in a recent case (2), which was an action of trover brought by the consignor of a quantity of wool, which had been detained by the defendants, on account of a general balance due from the plaintiff's factor, the defendants justified the detention under an ancient custom used in the trade of public warehouse-keepers in London, for a general lien upon all goods housed in their warehouses for, or in the name of, the merchants or other persons by whom such warehouse-keepers were retained, for all monies, or any balances thereof, due from such merchants, or other persons, to such warehouse-keepers, on account of any advances or expenses which such warehouse-keepers had made, or been put to, in paying the duties or customs by law imposed and charged on goods consigned to such merchants and other persons from abroad: and in paying the freight and other charges, and the advances, charges, and claims which the warehouse-keepers had made or been put to, for entering, landing, and warehousing such goods; the court held, upon a motion to enter a verdict for the defendant, *non obstante veredicto*, that the custom was an unreasonable one, and could not be supported. In delivering judgment, Tindal, C. J., observed:—"The general lien here claimed is not confined to goods the property of the person employing the warehouse-keeper, but extends to all goods which are put by him, in his own name, into the hands of the warehouse-keeper, whether his property or not. It renders the goods of the foreign merchant, which have been consigned to a London factor

(1) *Marzetti* v. *Williams*, 1 B. & Ad. 423.

(2) *Leuckhart* v. *Cooper*, 2 Hodg. 150; 3 Bing. N. C. 99.

for sale, and by him put into the warehouse of the warehouse-keeper for safe custody, liable to a private debt of the factor, for expenses incurred, in respect of other goods of third persons, which have been in his hands at former times, for charges contracted upon such goods during any antecedent period of time, and that, to an unlimited extent. It appears to us that such custom is *unreasonable and unjust*, and therefore bad in law. It is a custom which is obviously prejudicial in a direct manner, and in a very high degree, to foreign trade; for no foreign merchant would be content to consign his goods to this country for sale, if they could be made liable, whilstwa rehoused for the purpose of custody, to satisfy a debt already due from the factor to the warehouse-keeper, in respect of other goods. No authority has been cited in support of this custom, and as far as any analogy can be drawn from decided cases, it is against its validity."

This decision is consistent with an earlier established doctrine, as to the right of general lien operating against third persons, or where it might contravene, or interfere with, the prior common law right of another not claiming under the person from whom the right to the general lien was derived. Thus the right of a consignor of goods to stop them *in transitu* upon the insolvency of the consignee, being considered a common law right, and therefore paramount to that of the carrier to retain for his general balance, which could be founded only on special custom; it was determined, that an usage for a carrier to retain goods for the general balance of account between him and the consignee, could not in any case affect the consignor's right to stop the goods *in transitu;* which the latter might exercise at any time, before the consignee had acquired complete dominion over the goods, upon paying the carrier for the carriage only of those particular goods (1).

(1) *Oppenheim* v. *Russel*, 3 Bos. and Pul. 42

A similar doctrine to the one maintained in *Leuckhart* v. *Cooper*, was also admitted and acted upon in another case (1) of a carrier, who had detained goods consigned to a factor, for a general balance due on previous accounts. These decisions are clearly founded on the strictest basis of equity and justice, and with due regard to the interests of trade and commerce; for nothing would be more preposterous—more directly subversive of all security, either to a foreign or to a home merchant, if the bare consignment of goods should be held to authorize the pledge or detention of them, for debts due from a third party.

It is only in cases like these, where the injury has accrued to an innocent party, that the courts have denied or limited the operation of a general lien, established and sanctioned by custom. Thus an attorney, by recognised usage, holds the deeds and papers of his clients as security for all outstanding balances against them—and bankers, brokers, wharfingers, factors, and a few other traders, by the custom of their business, have similar rights for the recovery of their respective claims. And though, in truth, what was originally recognised by the common law as a specific lien, has now, by continued encroachment, become a general and more extensive right, in favour of particular bodies or trades, and induced the courts to check the further extension of the principle; parties, by special agreement, may, and often do, invest each other with co-extensive rights of general lien without the sanction of custom.

General lien may arise by the contract of the parties.

Thus, a right of general lien may arise out of the contract of the parties, independently of the usage of trade; even in cases where the law compels the unconditional exercise of a man's trade or calling. Common carriers, for instance, may annex terms, which, in the absence of any special contract, they would be unable to enforce:

(1) *Wright* v. *Snell*, 5 B. & Ald. 350.

provided that proof be afforded of the assent of the party sought to be affected by the arrangement: but a mere notice of an intention to claim a right inconsistent with their legal obligation would, in reason, be inoperative, unless explicitly assented to by the party against whom the claim is made. Such permissive right would, in fact, amount to the abrogation of that duty which the law has imposed upon them, for it would enable these parties to shield themselves behind such resolutions as must virtually amount to a recision of the law.

This restriction is not applicable, with equal force, to those parties on whom the law has imposed no such obligation, and where they may either decline employment from those who offer it, or accept it upon such terms, and in such manner, as they think fit. These persons may clearly clothe themselves with every power, and defend themselves by every condition they think fit: and may, therefore, enlarge their rights of lien, by annexing such extended conditions as the terms of their acceptance of employment. In this case, the assent of their employers need not be express. The publication of a notice of their intended mode of dealing, if proved to have reached the hands, or come within the knowledge, of their employers, will raise the inference, that all their subsequent dealings have been subject to the terms of the notice. Thus, bleachers, printers, or dyers, who, by the common law, have only a lien upon the goods sent to them for the purposes of their trade, to the amount or value of the work done thereupon, not unfrequently invest themselves with a more general lien by annexing to their invoices or receipts, a notice to the effect, that all goods received will be considered liable, not only for the amount of work done upon them, but for all previous sums due upon other goods. And it cannot be doubted, that, if the party sending the goods can be shown to have seen or received the notice, the lien

is as general, and as effective, as one established by immemorial custom. This point was most fully discussed and settled in the case of *Kirkman* v. *Shawcross* (1), which was an action of trover, for the recovery of a quantity of yarn delivered by a fustian manufacturer to a bleacher, in the neighbourhood of Manchester, for the purpose of being bleached. The manufacturer having become bankrupt, the sum due upon the specific goods was tendered, and a demand of the yarn made by the assignees; which demand was refused. It appeared in evidence, that *several years previously*, at a meeting of the dyers, dressers, whitsters, printers, and calenderers, of Manchester, certain resolutions had been adopted, that they would not, thenceforward, take into their possession any goods, for the purposes of their business, unless under express condition, that they should not only be subject to the debt due for the work and labour performed upon them, but also for the general balance due from the persons employing them, for work performed upon goods already delivered out of their possession. These resolutions were advertised by the meeting, and read by the bankrupt. It was held by the court, that such an agreement created a binding general lien; and Lord *Kenyon*, C. J., in delivering judgment, observed, " In most of the cases where it has been determined that the party had no lien, the difficulty arose from the general law not creating a lien in that instance, or from want of an agreement that a party should have a lien: but, in this case, there is an express agreement between the parties that the defendant should have a lien for his general balance; that agreement, so far from being illegal, is founded on justice, and therefore it is binding on the plaintiffs."

It seems to have been admitted, in the instance just

(1) 6 Term Rep. 14.

cited, that the bankrupt had read the resolutions, and been apprised therefore of the proposed extension of the particular lien to which only the party claiming it was, by the custom of the realm, entitled. It formed, in fact, a part of the compact under which the parties were to trade together, and was acknowledged and ratified by the bankrupt, by his continuing to carry on business with the defendant, after the known alteration in their customary mode of dealing.

The right, therefore, to define the extent or limit of lien is now undisputed, and has given rise to frequent contracts between parties, for the express recognition of a more general lien, than is allowed by common custom. To substantiate such right to encroach upon a fixed and defined common law privilege, the party claiming the lien must prove the person dealing with him to have had full knowledge of the substituted terms. On this account, it seems desirable that, in all cases where a trader would secure to himself a greater lien than is recognised by the custom of the realm, or by the established law and usage of trade, he should affect the party dealing with him, with undeniable knowledge of the terms, by entering into an express and particular contract. The mere publication of an advertisement, the intimation conveyed in an invoice, or a general notice affixed on the walls of an office, are insufficient, unless proved to have been seen or read by the person in respect of whose debt the lien is claimed, or, at least, that the notice has been published, affixed, or sent to him, under such circumstances as to raise the natural inference that he has become previously acquainted with its contents.

May be supported by usage or prior dealing between the parties.

And since the law has supported this extended right of lien, in cases of continued dealing after the parties have had notice of the purposed claim, it seems almost superfluous to remark that such general lien may be maintained, by reason of the unvaried usage and prior mode

of dealing on those terms between the employer and the employed; for proof of their having previously transacted business upon such understanding, affords the strongest possible inference that in continuing to deal together, they do so upon the same terms (1).

Specific or particular lien.

The right of particular lien, or, in other words, a specific lien on the particular goods in a tradesman's hands, for the value of work done upon them, has been universally admitted in every instance where, by the laws of the realm, a party is compellable to receive goods for the performance of any labour upon them (2). But in such cases, evidence of any usage for an extension of that lien to a lien for a general balance, ought to be proved by still stronger evidence than is necessary in cases where no such obligation exists (3).

Admitted in those whom law obliges to perform labour, &c.

Particular lien favoured by the courts.

This right of particular lien has been, at all times, favoured by the courts as consonant with every principle of equity and justice. Within a recent period, indeed, they have recognised and allowed, without restriction, the right of every bailee to a lien on the goods bailed to him, where any additional value has been conferred by him on the chattel, either directly, by the exercise of personal labour and skill, or indirectly, by the intermediate use of any instrument over which he has control (4). This broad and universal principle now places, beyond the shade of doubt, the rights of those in whose particular cases no direct judgment has been obtained, and points out a plain and easy mode upon which to

(1) *Rushforth* v. *Hadfield*, 7 East, 224.

(2) It was said by Ryder, C. J., delivering the opinion of the court in *Brennan* v. *Current*, cited Selw. N. P. 1286, that he had not found it laid down as a general rule, that the remedy by retainer was co-extensive with the obligation to receive goods. But see *Naylor* v. *Mangles*, 1 Esp. R. 109; and *Rushforth* v. *Hadfield*, 6 East, 554, per Lord Ellenborough, C. J., 7 East, 224.

(3) *Rushforth* v. *Hadfield*, *supra*.

(4) *Jackson* v. *Cummins*, 5 Mee. & W. 342.

ascertain the validity or invalidity of the claim. Thus, it has been decided that, by general law, no lien exists in the case of agistment, inasmuch as the agister does not confer an additional value on the article by any skill or labour employed by him (1); while, on the other hand, a lien has been adjudged to be claimable, by the owner of a stallion, on a mare for the expense or fees of covering (2); and by artificers generally, for the remuneration to which their labour, or expenditure, entitles them.

Agistment gives no right of lien.

In the case of agistment, where no such lien was held to exist, it may be observed, that, besides the reason assigned, an additional one prevailed why the lien was not maintainable. The agistment claimed was in respect of milch cows, and from the very nature of the subject-matter, the owner would have possession of them during the time of milking; and there was nothing in the case to show that the owner might not, for that purpose, have taken the animals out of the field where they were grazing, if he had thought proper so to do. The claim, therefore, was inconsistent with the necessary enjoyment of the property.

This necessity for actual possession as the foundation of the claim of lien will be treated of in its proper place. Independently of the absence of such possession in this instance, there can be no doubt that the case of the agister would have been held not to come within the principle defined.

Right of lien for salvage.

The law has also recognised the right of lien as belonging to those who, at the risk of their personal safety, effect the recovery of property or ships at sea (3). The mere finding of a wreck, where no danger or risk is in-

(1) *Jackson* v. *Cummins*, 5 Mee. & W. 342; *Chapman* v. *Allen*, Cro. Car. 271.

(2) *Scarfe* v. *Morgan*, 4 Mee. & W. 270.

(3) *Hartford* v. *Jones*, 1 Ld. Raym. 393.

curred, or the recovery of lost property on land, are not, however, within the grounds upon which this right has been allowed in case of salvage at sea. The taking care of goods left by the tide upon the banks of a navigable river communicating with the sea, may, in a vulgar sense, be said to be salvage; but, it has none of the qualities of salvage, in respect of which the laws of all civilized nations, the laws of Oleron, and our own laws in particular, have provided that a recompense is due for the saving, and which our law has also provided shall be secured by lien on the goods which have been saved. Goods carried to sea are necessarily and unavoidably exposed to the perils which storms, tempests, and accidents (far beyond the reach of human foresight to prevent), are hourly creating, and against which it too often happens, that the greatest diligence and the most strenuous exertions of the mariner cannot protect them. When goods are thus in imminent danger of being lost, it is most frequently at the hazard of the lives of those who preserve them, that they are saved (1); and it is no less a just, than a politic and wise extension of the law, to allow to these parties the means of securing to themselves a reasonable compensation. But, however good and meritorious may be the mere finding and protection of the property of another where no personal danger is incurred, and however entitling the party to some reasonable recompense from the bounty, if not from the justice, of the owner, and of which, if it were refused, the courts would go as far as they could in enforcing payment(2), the law has not yet extended to such a case the right of lien for enforcing the amount.

Where goods are held under legal detainer, and expenses incurred.

Another species of particular lien arises in some cases, where goods have been taken under a legal right, and

(1) *Nicholson* v. *Chapman*, 2 H. Bl. 254, per Eyre, C. J.

(2) *Nicholson* v. *Chapman*, 2 H. Bl. 254; and see *Bucks* v. *Bristead*, 2 Bl. 1172.

expenses have been necessarily incurred in their preservation. Thus, the lord of a manor is entitled to amends for the keep of a horse which he has seized as an estray; but must, in such case, demand a sum certain, otherwise a general tender of amends will be sufficient to bar him of his lien(1). But goods taken in distress and replevied are not subject to any lien on the part of the distrainer, who is left to his remedy on the replevin bond(2). And, where a horse was distrained to compel an appearance in a hundred court, it was held, that, after appearance, the plaintiff could not justify detaining the horse till his keep was paid for(3).

Particular lien may be secured in any case by agreement;

Having already shown that a right of lien for general demands may be secured by express contract, it follows, *à fortiori*, that parties whom the law has not recognised as entitled to the right, may reserve to themselves a power of retention of all goods placed in their hands till their particular claims, in respect of them, are satisfied. Such is, in fact, the constantly recurring mode of securing advances by deposit or pledge, by the delivery of goods into the hands of the lender.

Or, be implied from the course of dealing.

So, the established mode of dealing between parties may infer a stipulated right of lien, and such has been allowed against the produce of West India estates, in respect of supplies furnished to them upon an agreement implied from the course of dealing and conduct of the parties(4).

Work for which lien claimed must have been done by owner's directions.

The work in respect of which a lien is claimed, must have been done at the request of the owner of the goods detained; and, therefore, where a servant took his master's chaise, which had been broken by his negligence, to a coachmaker to be repaired, without his master's

(1) *Henry* v. *Walsh*, 2 Salk. 686; 2 Rolls Abr. 92.
(2) *Bradyll* v. *Ball*, 1 Bro. C. C. 427.
(3) Bull, N. P. 45.
(4) *Simond* v. *Hibbert*, 1 Russ. & M. 719.

knowledge, it was ruled, that the coachmaker had no right to retain the chaise against the master, for the repairs (1). The generality of this rule may be, however, restrained by the particular circumstances of each case. Here it appeared that the coachmaker had not been employed by the master previously, and that the work was done without communication with him upon the subject. Neither was the order within the scope of the servant's general authority, or, doubtless, the lien would have attached. Thus, in the case of carriers, upon whom the legal obligation lies, to receive and carry the goods of every person when required, they are not obliged to inquire into the title of the party who delivers them, but may detain against the true owner till the carriage is paid, though the latter should prove that they had been stolen from him by the person who delivered them to be carried (2).

Exceptions.

Carriers.

Innkeepers. An innkeeper, also, may claim a lien on a horse for his keep, against the rightful owner, although wrongfully seized under colour of a legal proceeding, unless he knew that the party making the seizure was a wrong-doer at the time it was made (3).

Tailors. Again, a tailor has a lien for the value of his work, on the cloth delivered to him by a servant, to make his master's liveries (4).

No right vests under tortious receipt of goods from agent. As a general rule, however, no right is vested by the tortious act of a third party, nor, in any case, with the after-mentioned exception, can a tradesman detain goods which have been delivered to him in this manner, for the general balance due from the party delivering them, if, at the time, it was within his knowledge, that he was not the true owner of them. Thus, where a gra-

(1) *Hiscox* v. *Greenwood*, 4 Esp. 174.
(2) *Yorke* v. *Grenaugh*, 2 Lord Raym. 867, per Lord Holt, C. J.
(3) *Johnson* v. *Hill*, 3 Stark. 172.
(4) *Hussey* v. *Christie*, per Lord Ellenborough, C. J., 9 East, 433.

zier, in the country, employed a salesman to sell some oxen for him in Smithfield market, and the salesman employed a book-keeper, who acted in the same capacity for several others, and whose duty it was to receive the purchase-money, and to keep an account of the cattle sold, distinguishing what each beast sold for, and to whom it belonged, and to pay the money over to the respective owners, upon receiving an order to that effect from the salesman; it was held, that the book-keeper could not retain the money for the grazier's oxen from him, on the ground of a balance due from the salesman (1).

So, it has been held, that an agreement by one on behalf of another, but without his sanction, for the standing of a phaeton belonging to the latter, at the warehouse of a painter, invests the painter with no right of lien for the consequent charge, for he has no right to keep property, and charge for the keeping of it, without the sanction of the owner, or of some agent duly authorized by him (2).

Factors' and brokers' authority regulated by statute.

With respect to factors and brokers, whose authority is specially defined by statutory provisions, the case is different. Powers are now vested in these parties by enactment, which did not appertain to them at common law. Independently of these statutes, no right of lien attached upon goods delivered by them beyond the interest, of right, claimable by themselves, unless for money advanced, or particular work done, for purposes connected with the sale (3). Factors had a right to sell, as incident to their character, and the terms of sale were binding upon the principal; but they had no right to pledge the goods entrusted to them, without the fullest

(1) *Good* v. *Jones*, Peake's Ca. 176.
(2) *Buxton* v. *Baughan*, 6 Car. & P. 674.
(3) *M'Combie* v. *Davies*, 7 East, 6.

and most explicit authority for that purpose. The 4 Geo. 4, c. 83, amended and enlarged by the 6 Geo. 4, c. 94, has since enabled all persons entrusted with goods, or documents of title relating to goods, to make valid contracts for the sale of them, or for the deposit or pledge thereof, as security for any money, or negociable instrument advanced, or given, by any person; provided that the party purchasing, or advancing the loan, has no notice that the agent, with whom he deals, is not the true owner of the goods so sold or pledged.

I purpose to treat, under its separate head, of the law as it now affects persons dealing with factors and brokers. It may be sufficient, in this place, to refer generally to the particular statutes under which their case differs from that of other parties.

General rule as to servants and agents

With the exceptions mentioned, the rule in the case of agents is plain, and clearly defined. Delivery of goods by an agent or servant, in the performance of his common duty, may confer on persons a particular lien, for the labour bestowed upon them in the execution of their trade; but if tortiously delivered by the same persons, or pledged for a loan or otherwise, no lien can thereby be acquired, and the owner may recover them from the possession of the person to whom they have been delivered, without even tendering a sum for the trouble and expense which may have been incurred in respect of them. This was held in the case of the coachmaker already referred to (1), where the claim of retention was founded on repairs done on the unauthorized request of a servant. Lord Ellenborough, in his judgment, said, that a coachmaker had no such right. Whatever claim he might have of that sort, he must derive it from legitimate authority. That unless the master had been in the habit of employing the coachmaker in the way of his trade, it

(1) *Hiscox* v. *Greenwood*, 4 Esp. 174.

should not be in the power of the servant to bind him to contracts of which he had no knowledge, or to which he gave no assent. It was the duty of the tradesman, when he was employed, to have inquired of the principal if the order was given by his authority; but having neglected to do so, and the master having never employed him before, the master was not liable to the demand, and the detainer of the chaise was unlawful.

This solitary instance of employment was, perhaps, a ground for exciting reasonable suspicion that the act of the servant was unauthorized, and should, at least, have caused inquiry on the part of the coachmaker. But it is apprehended, that under general circumstances, such excess of authority, on the part of a servant, would not disentitle a trader to a specific lien for the labour performed upon the goods delivered to him; for, unless attended by the suspicious circumstance that, in other cases, the master habitually employs different tradesmen, there is nothing in such an act that tends to the probable inference that the servant is acting beyond the scope of his ordinary business and duty.

Nature of the possession requisite to constitute right of lien.

In considering the nature of the possession requisite in a party claiming a right of lien, whether general or specific, I may render the subject more easily intelligible by a division of it into the four following heads.

First. The effect of wrongful or unauthorized possession.

Secondly. Possession acquired for a specific purpose, excluding the application of the general rule in favour of lien.

Thirdly. The essential and continuing possession under which the right of lien may be exercised.

And fourthly. What acts amount to a relinquishment of goods, or change of custody, so as to defeat the right of lien.

Cannot be ac-

1. A lein can, in no instance, be acquired by the

quired by wrongful possession.

wrongful act of the person claiming it (1). If, for example, a party having given his acceptance for another, obtain from the attorney of the latter a cheque for the amount, under a representation that such sum is due to him *on balance of account*, he will not be allowed to retain it (2). And if a person obtain goods or other property wrongfully, and pay the freight and other charges upon them, he has no right to detain them even for the amount expended (3). So the unauthorized payment of duties upon goods which the holder has voluntarily taken into his own possession, is no ground for detaining them against the rightful owner. Thus, where the plaintiff was the captain of a ship, and the defendant owner, and the plaintiff had brought over a small parcel of elephant's teeth, on his own account, and a large parcel for the defendant, who entered the whole at the custom-house, paid the duty, and had the whole delivered out to him, and not re-delivering to the captain the portion belonging to him, an action of trover was brought. It was insisted for the defendant, that the plaintiff should show that he had either paid or tendered the duty, otherwise the goods were in the nature of a pledge, and he was not bound to deliver them; but it was held that this would not justify the defendant in keeping them (4).

Duties paid upon goods obtained without authority, no ground of detainer.

The doctrine of lien is governed by equitable principles, and the law will not construe any act to vest possession which in itself amounts to fraud. There must be a *bonâ fide* right to take possession, and neither the tor-

(1) *Griffiths* v. *Hyde*, 2 Selw. N. P. 1358; *Bernal* v. *Pim*, 1 Gale, 17.

(2) *Madden* v. *Kempster*, 1 Camp. 12.

(3) *Lempriere* v. *Pasley*, 2 T. R. 485.

(4) *Stone* v. *Lingwood*, 1 Str. 651. No assumpsit can be raised on the voluntary and unasked payment of the debt of another person; for one man cannot become the creditor of another without his knowledge or consent. *Stokes* v. *Lewis*, 1 T. R. 20; *Child* v. *Morley*, 8 T. R. 610; *Lord Galway* v. *Mathew*, 10 East, 264; 1 Saund. 264, note (1), though otherwise if the payment be compulsory, *Jefferies* v. *Gurr*, 2 B. & Ad. 833.

tious act of the party claiming the lien, nor, of a third party, even though innocent of intended fraud, can vest such title (1). In a case where actual possession was given to a factor by a carrier, under the directions of the shipper (subsequent to his bankruptcy), the court held, that it was not such a possession as to give the factor a lien against the assignees, although the goods were shipped on account of the factor, and bills had been accepted by him on the faith of them; such an order rather operating to defeat the claim of lien, as being an act of ownership exercised by the bankrupt (2).

Unauthorized possession vests no right of lien.

And where a party, acting as agent, obtained goods from a warehouse where they had been deposited in the name, and at the expense, of the principal, without the authority of the latter, and subsequently to his bankruptcy; it was held that he thereby acquired no lien on the goods, for any outstanding claim he might have against the bankrupt (3).

Possession for

2nd. Possession may be vested under such circum-

(1) See the old case of *Hartop* v. *Hoare*, 3 Atkyns, 43. The plaintiff being owner of a quantity of jewels, lodged them, with other jewels, for safe custody, in the hands of James Seamer, jeweller and banker, enclosed in a paper, which was sealed and put in a bag. The bag also was sealed with the plaintiff's seal, and a receipt was taken for the parcel. Subsequently, Seamer broke the seals, took out the jewels, and carried them to the defendant's shop, which was a public open shop in Fleet Street, London, where the defendants carried on the business of bankers, traded in jewels, and frequently lent money upon them. Seamer then borrowed 300*l.* from the defendants, and deposited the jewels, as his own goods, by way of security. The question was, whether Sir John Hartop, the plaintiff and owner of the jewels, could, under the circumstances, recover them from the defendants, inasmuch as Seamer had neither a general nor special property in them; for, though he originally came into possession rightfully, yet by breaking the seals, and taking the jewels out of the bag, and by that means enabling himself openly to deliver them to the defendant, he was possessor *malæ fidei*; and judgment was given for the plaintiff.

(2) *Nicholas* v. *Clent*, 3 Price, 547.

(3) *Taylor* v. *Robinson*, 2 Moore, 730.

a specific purpose excluding right of lien.

stances as to exclude the application of the general rule in favour of liens.

Where, for instance, the delivery of goods or other matters is accompanied by terms tending to show a deposit for any defined or special purpose, inconsistent with a right of detainer, no lien attaches in favour of the holder for any debt or balance due from the depositer. Thus

Possession under agreement to restore chattel.

where a chattel is deposited with a person upon a special trust, and under an express agreement by the depositary to restore it, after the expiration of a limited period, and where, from its nature, no adequate compensation can be obtained for it in damages, and an action of law would be ineffectual, a court of equity has compelled the depositary to deliver it up in specie, after the expiration of the trust (1).

For purpose of sale.

Where a factor has received goods for the specific purpose of sale, and under an agreement to appropriate the proceeds in a particular manner, it has been held that he has no lien for any general balance due from the depositer, for the terms of the contract preclude the supposition upon which a lien is founded, viz. that they are deposited by way of pledge (2). So, where an agent has

For safe custody.

received into his hands a policy of insurance for safe custody only, he can acquire no general lien on the instrument for advances made during his possession of it (3).

And, where a trader, on being applied to by a creditor for a debt of 47*l.*, gave him a bill for 100*l.* to get discounted, and promised to pay the creditor's debt out of the proceeds, but before the bill was discounted, became bankrupt, it was held that the creditor had no lien on the bill for his debt, but that the assignees were

(1) *Folls* v. *Read*, 3 Ves. J. 70.

(2) *Walker* v. *Birch*, 6 Term Rep. 258; *Kinlock* v. *Craig*, 3 Term Rep. 119.

(3) *Muir* v. *Fleming*, 1 D. & R. 29.

entitled to it; for the agreement was, not that the bill should be retained as a security, but that it should be discounted (1). But if, under these circumstances, the creditor had advanced the trader a part of the money, such sum must have been paid or tendered by the assignees before they could have entitled themselves to the bill (2).

Numerous other authorities might indeed be cited to show that the right can only originate in, and be supported by, duly authorized and unconditional possession. It may be sufficient, however, without particularizing the cases, to state, that in every instance where a restricted possession is either apparent, under the express terms upon which a chattel is delivered, or may be inferred from the circumstances of the delivery, the right of general lien is necessarily excluded. Such have been the decisions, where bills have been entrusted to an insurance broker for the special purpose of getting them discounted (3), where papers have been left in the hands of a banker by mistake (4), and, where the certificate of the registry of a ship has been given by the captain to a factor for the express purpose of discharging the duties (5), and the respective documents have in each case been held to be protected from liability to the general claims of those parties.

And upon this principle, where two parties joined in a contract to supply provisions to the navy, and to deliver them into the government stores, and one indorsed to the other a bill of lading of a cargo of provisions which he had shipped for the purposes of the contract, it has been held, that the latter is not entitled to a lien on the cargo,

(1) *Humphries* v. *Wilson*, 2 Stark. Rep. 566.
(2) *Key* v. *Flint*, 8 Taunt. 21 ; 1 Moore, 451, *S. C.*
(3) *Judin* v. *Samuel*, 1 N. R. 45.
(4) *Lucas* v. *Dorrein*, 7 Taunt. 278.
(5) *Burn* v. *Brown*, 2 Stark. Rep. 272.

for any debt due to him from his partner (1); for the tenor of the agreement between the parties being that the goods should be delivered according to their original destination, they could not be legally diverted to any other purpose.

Nature and continuance of possession.

3rd. Having shown that a tortious, or unauthorized, or limited possession, is insufficient to ground any original claim of lien, I shall proceed in the next place to point out the nature of the possession which is required to entitle a party, having obtained a substantial and legal right of lien, to a continuance of the right to exercise it.

Possession essential to the exercise of the right of lien.

The right of lien is necessarily subservient to, and dependent upon, the right of possession of the chattel over which it is claimed. Where, by the essence of the contract, a bailee has no right to the uninterrupted possession of it, as in the case of a race-horse, delivered to a trainer to be trained *generally*, which, by the custom in such cases, would entitle the owner, during the process, to take the animal elsewhere for the purpose of running races, no lien can exist; for the claim to it would be inconsistent with the necessary enjoyment of the property (2). So, in the case of milch cows, as already observed, on the farm of an agister, for the owner must necessarily claim occasional possession for the purpose of milking them (3).

A mere equitable interest not sufficient.

The possession must be also absolute. A mere equitable interest in goods will not entitle a party to lien; for this term implies a right to hold (4). Thus, the consignment of a cargo to a party with a direction to pay a particular person a sum of money out of the proceeds, entitles the

(1) *Smith* v. *Burridge*, 4 Taunt. 683.

(2) *Kinlock* v. *Craig*, 3 T. Rep. 119, 783; *Taylor* v. *Robinson*, 8 Taunt. 648.

(3) *Jackson* v. *Cummins*, 5 Mee. & W. 342.

(4) *Heywood* v. *Waring*, 4 Camp. 291.

latter to no right of lien in respect of his claim (1). Nor does the mere indorsement of a bill of lading by a consignor to a consignee constitute a lien in favour of the latter for his advances to the consignor (2). But, though the possession may not have been originally such as might entitle a claimant to a legal right of lien, the assent of the owner to a subsequent seizure of property, and a promise by him to pay the demand of the party, may be such as to prevent a person purchasing it and assenting to the promise, from recovering the property, in an action of trover, without tender of the amount demanded. Thus, where the owner of a vessel sent her to the yard of a shipwright to be repaired, and the latter, along with other persons, furnished timber, for that purpose, to the amount of £200, but the repairs were done by others, on the vessel being advertised for sale, the shipwright and the others who had furnished the timber insisted that she should not be removed till they were paid, and the shipowner's agent agreed to this, and signed an order to the auctioneer to that effect. The ship was then sold, and the purchaser assented to the arrangement, and promised payment on a day fixed, but neglected to make it; it was held, that the agreement for the payment of the repairs out of the purchase-money, of which the purchaser was cognizant, and to which he had assented, precluded him from maintaining trover until such payment was made (3).

The principle which guided the judgment in this case does not, however, interfere with the recognised necessity for actual possession where the claim is expressly that of lien. Had the purchaser not assented to the arrangement he would not have been bound by it, but having done so, he undertook thereby to pay the purchase-money

(1) *Ex parte Heywood*, 2 Rose, 355.
(2) *Smith* v. *Burridge*, 4 Taunt. 684; *Harvey* v. *Liddiard*, 1 Stark. 123.
(3) *Norris* v. *Williams*, 1 Cr. & M. 842.

in a particular mode, and precluded himself from recovering the subject-matter of sale, till he had complied with the terms of the agreement between the parties.

Possession must be continued.

4th. Continuance of possession is indispensable to the exercise of the right of lien (1). An abandonment of the custody of matters over which the right extends, necessarily frustrates any power to retain them, and operates as an absolute waiver of the lien. The holder is in such case deemed to yield up the security he has upon the goods, and trust to the personal responsibility of the owner.

Relinquishment of possession may be actual or constructive, and divests lien.

Relinquishment of possession may be either actual or constructive. Thus, the delivery of goods by one who has a lien on them, to a ship-carrier, to be conveyed on account, and at the risk, of his principal, though unknown to the carrier, is such a change of the custody as to prevent the former from recovering his lien, by stopping the goods *in transitu*, and procuring them to be re-delivered to him, by virtue of a bill of lading signed by the carrier in the course of his voyage (2). So, where orders are given by a factor to a warehouseman, in whose warehouse goods are, to deliver them up to a broker employed by the principal on the occasion, telling the broker, at the same time, that the principal intends to sell them himself to save commission, and the broker sells them, and makes out bills of parcels to the principal, without taking any notice of the factor; such conduct, on the part of the factor, amounts to the same thing as if he delivered up the goods in specie to the principal, and he therefore loses his lien upon them (3).

(1) See *Ryall* v. *Rolle*, 1 Atk. 165. If goods have been obtained illegally or by fraud, so as to divest a vendor's right of lien, he may resort to an action of trover, and is not bound to proceed against the party for the debt due in respect of them. See *Dicas* v. *Stockley*, 7 Car. & P. 587; *Hawse* v. *Crowe*, R. & M. 414; *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 514; 2 D. & R. 755.

(2) *Sweet* v. *Pym*, 1 East, 4.

(3) *Kruger* v. *Wilcox*, Ambl. 252.

And where a party having a lien on goods, caused them to be taken in execution at his own suit, it was held that he had thereby destroyed his right of lien, though the goods had never been removed from his premises (1), for possession must have been virtually vested in the sheriff in order to enable him to sell the goods.

Possession may be held by third party on behalf of another.

But the required possession is not necessarily the personal possession of the party claiming the lien. If, for instance, a chattel be deposited with a third party in pursuance of the original terms and provisions of the original agreement, such deposit is no forfeiture of the right of lien, for the possession of the party to whom the property is delivered, is essentially the possession of the other. Thus, where a person pledged a chattel with another, and consistent with the agreement made between them at the time, the pawner retained the possession of it for a limited period, and then returned it to its ordinary place of custody instead of delivering it to the pawnee himself, it was yet held that the possession was virtually in the latter, and that he did not thereby forfeit his lien (2).

Executor having lien on insurance policy, may give receipt for proceeds *as executor*, without compromising his right.

The mere deposit of a policy of insurance is effectual for the purpose of lien, without a formal assignment; and though the pawnee be appointed executor of the pawner, and give receipts for the proceeds *as executor*, he does not thereby lose the benefit of his lien.

Thus, where one Clarke, the testator, being indebted to a person of the name of Rowntree, deposited with him, as security for money advanced, a life insurance policy, and communicated to the insurance company that he had transferred his interest in the policy to Rowntree, of which they made a minute in their books, and then Clarke died, having appointed Rowntree and another his executors, but not having made a formal assignment of the

(1) *Jacobs* v. *Latour*, 2 M. & P. 20; 5 Bing. 130.
(2) *Reeves* v. *Capper*, 5 Bing. N. C. 136; 1 Arn. 427, *S. C.*

policy. The insurance company having refused to pay the proceeds of the policy, without a receipt from the executors of Clarke, they signed in such capacity, Rowntree, at the same time, delivering a protest stating that he had only done so to obtain the money, and that he did not thereby compromise his own claim—it was held, that he was entitled to appropriate the proceeds in payment of his own claim, for the form of the discharge did not deprive him of that which he claimed at first in his own right, and afterwards gave an acquittance for as executor, only because he could not otherwise obtain it (1).

General lien may be limited or excluded by agreement.

As either a general or particular lien may be created, so it may be controlled or excluded by special contract between the parties. "*Conventio vincit legem*" is a maxim as old as the law, and persons are entitled, if they please, to introduce into their contract any article to prevent the general application of a general rule of law (2). Thus, notwithstanding the acknowledged right of a factor or broker to a general lien upon the goods of his principal, he may at any time be compelled to re-deliver articles deposited with him for an express purpose, not yet carried into effect. Where, for instance, a quantity of cotton was placed with a factor under an express stipulation that he should sell it, and hand over the proceeds of the sale to the principal, it was held, that while it remained unsold, no previously existing demand against the principal would justify a detention of it on the part of the factor, for as the agreement for lien arises by implication of law, so by agreement between the parties may such implication be excluded (3). The marginal note of *M'Gillivray* v. *Simpson* (4), which has been copied into various text-books, would seem to import a contrary conclusion, viz.,

(1) *Glaholme* v. *Rowntree*, 1 W. W. & D. 280; 6 Ad. & Ell. 710; 2 Nev. & P. 557.

(2) Per Lord Kenyon, C. J., *Walker* v. *Birch*, 6 Term Rep. 258.

(3) *Ibid.*

(4) 9 D. & R. 35.

that "an agreement by a broker to sell goods for his principal, and pay over the whole proceeds, without setting off a debt then due to him from his principal, is not binding upon the broker, so as to deprive him of his right of lien or set-off." This was a question, however, not directly between the broker and the principal, but between the broker and *the assignees of the principal*, subsequently to the bankruptcy of the latter. The transaction, therefore, was one controlled by, and subject to, the provisions of the Bankrupt Law, 6 Geo. 4, c. 16, by the 50th section of which it is enacted, that where there has been mutual credit given by the bankrupt and any other person, or where there are *mutual debts between the bankrupt and any person*, contracted at any time before such person became a bankrupt, the assignees shall state the account between them, and one debt may be set against another, and what shall appear to be due on either side, on the balance of such account, and on setting such debts against one another, and no more, shall be claimed or paid on either side. The case involved rather a question of set-off than of lien, nor can it, in any respect, be considered as affecting the recognised principle of waiver by consent. The action was instituted for recovery of the produce of goods sold, not for the specific chattels themselves; and the question between the plaintiffs, as assignees, and the defendant, was not whether he might detain, by way of lien, the goods he had been commissioned to sell, in contravention of a direct and positive undertaking to the contrary, but whether, after disposition of the goods, he had not a right to set off the proceeds of the sale against the general claim of the assignees, on a settlement of the mutual accounts of the defendant and the bankrupt.

Lien may exist on an executed contract, originally illegal, if

A lien, it has been decided, may exist under an executed contract, though that contract were originally illegal. Thus, though the claim arises on a transaction in the

Illegality arose by default of both parties.

course of the ordinary calling of the defendant, and is illegal as a contract made on a Sunday, under the 29 Car. 2, c. 7, a special property passes by delivery of the thing, and the lien is valid, for the maxim, *in pari delicto potior est conditio possidentis*, is applicable (1).

But not so where contract is rendered illegal by non-feazance of the party claiming the lien.

But where a contract is entered into, which cannot be enforced except on the foundation that certain requisites of an act of Parliament are complied with, as a condition precedent on the part of the person by whom the lien is subsequently claimed; as where a pawnbroker advances money on the deposit of goods, without giving to the pawner the ticket required by law, the contract itself is void, and no lien attaches for the loan on the articles deposited (2). Here the illegality of the contract arises by the misconduct of the party seeking to establish the right of lien. The violation of the statute is the act of the pawnbroker alone, and having neglected to comply with the regulations imposed as precedent of, or accompanying, and making out, the contract, he cannot detain the goods for the amount of the loan, without showing something in the dealing between the parties, beyond the ordinary circumstances between pawner and pawnee.

Antecedent contract for future payment defeats right of lien.

It was formerly a question of frequent discussion whether any distinction existed in the right of lien between an agreement for a stipulated price, and an implied contract to pay a reasonable sum. The right of detainer has, however, been practically acknowledged in both cases alike. A special antecedent contract for a particular mode of future payment destroys, of course, any right accompanying an implied contract for present payment; and a party can have no right to set up a claim of detention inconsistent with the terms of his contract. But it is not so, if a mere determinate price, and not a future day of payment, be fixed. Thus a workman, who has

But not so a merely fixed price.

(1) *Scarfe* v. *Morgan*, 4 Mee. & W. 282.

(2) *Fergusson* v. *Norman*, 5 Bing. N. C. 76.

bestowed his labour upon a chattel in consideration of a price fixed in amount, by agreement with the owner, may detain the chattel until the price be paid, even though it may have been delivered to him in different parcels, if the work done under the agreement be entire (1).

But if by agreement, a purchaser of goods is entitled to have them immediately, and the payment, in respect of them, is to take place at a future day, that is inconsistent with any present right to retain the goods till payment, and the seller has consequently no lien for their price (2).

Debt must be due, before lien can arise.

And since, in order to support a claim for lien, the debt for which the goods are detained must be due, it is clear that such claim is no less inconsistent, whether the credit given be in pursuance of a special contract, or proceeds from any usage of trade, equivalent to a special agreement to that effect. Thus, by the custom of the trade of shipwrights on the river Thames, credit is given to the owners for various periods, and a ready money payment is not demandable except by express stipulation (3). In such case lien never attaches, for the owner resumes possession of his ship, before the demand for repairs is due.

So, when by the course of trade, wharfage is not payable upon goods imported, till a certain period after the importation, no right of lien attaches intermediately for the fees due (4).

Security taken for debt payable at a distant day defeats lien.

Upon the same principle, it has been well established, by numerous authorities, that if security be taken for a debt for which the party has a lien upon property of the debtor, such security being payable at a distant day, the lien is gone (5). This principle, as to waiver of lien, is

(1) *Chase* v. *Westmore*, 5 M. & S. 180.
(2) *Crawshay* v. *Homfray*, 4 B. & Ald. 50.
(3) *Raitt* v. *Mitchell*, 4 Camp. 146.
(4) *Crawshay* v. *Homfray*, 4 B. & Ald. 50.
(5) *Hewison* v. *Guthrie*, 2 Hodg. 51; 2 Bing. N. C. 755, *S. C.*

not regulated by the usage of trade, nor consists in a mere rule of law, that the special contract determines the implied one, but in the inconvenience which would result (the necessities of mankind requiring that the goods should be delivered for consumption) from the extension of the lien for the whole period which the security has to run; for it must be presumed, either that the lien is to continue with and accompany the security until payment, or that it is relinquished by the substitution of the security (1).

Part payment for goods by vendee does not defeat right of vendor to lien for balance;

The circumstance of the vendee having partly paid for the goods, does not defeat the vendor's right of lien, on the bankruptcy of the vendee, for the vendor has a right to retain them till the whole price has been paid (2). To allow such exception to the general rule would be to destroy the rule itself, since every payment, however small, even the payment of a farthing, by way of earnest, would prevent its operation (3). Nor is the right defeated by seizure of a vendee's goods under process out of the Mayor's Court, at the suit of the attaching creditor, for the latter has no greater right to the goods than the vendee himself. The vendor's power of intercepting the goods is the elder and preferable claim, and not superseded by the attachment, any more than it would be by the general right of a common carrier to retain all his customer's goods for his general balance, which has been decided as untenable (4).

Nor seizure under process against vendee's goods, at the suit of a creditor.

Waiver of lien.

A party having rightful possession of goods, under a claim of lien, ought to state the nature of such claim, and the amount for which he detains the goods, at the time when re-possession is demanded.

Claiming on ground incon-

Retention on a ground inconsistent with the existing

(1) Per Lord Eldon, in *Cowell* v. *Simpson*, 16 Ves. J. 279.
(2) *Hodgson* v. *Loy*, 7 T. R. 440.
(3) *Ib.* per Lord Kenyon, C. J.
(4) *Smith* v. *Goss*, 1 Camp. 282; and see *Natham* v. *Giles*, 5 Taunt. 557.

right, without any claim in respect of the amount under which a person may legally withhold them, operates as a waiver of the lien, and trover will lie for the recovery of the goods, without evidence of any tender of the latter amount. Thus, in an action of trover for some brandy, which lay in the defendant's cellars, and which, when demanded, he had refused to deliver up, saying it was his own property; omitting to mention, at the same time, that certain warehouse rent was due to him on account of the brandy: it was held, that as he had detained it on a different ground, he must be taken to have waived his lien (1).

Refusal inconsistent with right of lien, amounts to a waiver.

And, where the captain of a ship, by his bill of lading, undertook to deliver goods to a person appointed by the vendee, and, on the vendee becoming bankrupt, refused to deliver them to the vendor, alleging that he had signed a bill of lading to deliver the goods to another; it was held, that he had dispensed with a tender of the freight, for which he might legally have detained the goods, and that there was therefore presumptive evidence of a conversion (2).

But a refusal to deliver up the goods, without express mention of the lien, does not necessarily amount to a dispensation of it, unless accompanied by some claim inconsistent with the actual right.

Omitting express mention of ground of lien, no waiver.

Thus, where a person, who had a lien on some cloth, purchased it from the bailor, after his bankruptcy, and when the cloth was demanded of him by the assignees, refused to give it up, saying, "I may as well give up every transaction of my life;" it was held, that this did not amount to a waiver of his lien, and that the lien was not merged in the purchase (3).

(1) *Boardman* v. *Sill*, 1 Camp. 410 (*note*).

(2) *Thompson* v. *Trail*, 6 B. & C. 36; 9 D. & R. 31, *S. C.*

(3) *White* v. *Gainer*, 2 Bing. 23; 1 C. & P. 324, *S. C.*; and see *Jones* v. *Cliff*, 5 C. & P. 560.

It will be observed, however, that the party holding the cloth said nothing inconsistent with the claim of lien; and besides this, it appeared in evidence, that in a subsequent conversation he had said, "that the thing might have been settled long ago, if the assignees would have allowed him his demand for milling and rowing the cloth.

So, where the plaintiff being assignee of a lease, deposited it with a party, with authority to raise money on the deed, and the defendant having advanced money to such party, which was not repaid, refused to re-deliver the deed, and was thereupon sued in trover; it was held, that he might give these facts in evidence, under a plea that the plaintiff was not possessed of the deed as his own property, at the time of the action; and that the plaintiff was not entitled to recover, though no express mention of the lien had been previously made (1).

Demand of larger amount than due, no waiver of lien in respect of sum actually owing.

The demand of a general balance, including the particular sum for which the lien has specifically attached, does not dispense with the necessity, on the part of the owner of the goods detained, of tendering the smaller amount (2). This point, which has recently received the fullest consideration, is now definitively settled; and earlier cases, seeming to establish the necessity of a precise claim, by which a party will be literally bound, are now reconciled and explained.

"It appears to me," observed Mr. Baron Alderson, in

(1) *Owen* v. *Knight*, 4 Bing. N. C. 54; and see *White* v. *Gainer*, 2 Bing. 23.

(2) *Scarfe* v. *Morgan*, 4 Mee. & W. 273; 1 Horn & Hurl. 294, *S. C.*; *Ayling* v. *Williams*, 5 Car. & P. 399, does not actually conflict with the doctrine here established. "All that the learned Judge there says, is, that if the case had turned on the question of tender, he would have given the defendant leave to move." See per Alderson, B., in *Scarfe* v. *Morgan*, *supra*; and see *Knight* v. *Harrison*, cited in Saund. Pl. & Ev. 641, where the right of property was claimed in a third person, against whom the defendant had a lien for his general balance.

the case of *Scarfe* v. *Morgan*, "a monstrous position, that a party who claims a lien in respect of two sums, is supposed to have waived it, in respect of one of them. The more natural conclusion is, that he intended to insist on both. It was the duty of the plaintiff to have tendered either one sum or the other. If he had said, 'I tender this specific sum,' it might have caused the defendant to reflect whether he had a right to detain for any other claim."

And in a case tried before Parke, B., at Guildhall, where there was a claim of lien in respect of repairs done to a carriage, some of which had been ordered and some not; it was held, that an unsevered claim for both was no waiver of the real claim (1). In each of these cases, there was no repudiation of the proper and available ground of lien; the parties claimed in respect of a substantial right, but coupled it with another and untenable demand; and were entitled to a tender of such sums as they were legally authorized to detain for.

Lien cannot be sold.

A lien, distinguished from a distinct pledge, can be retained only as a security for the debt due; and, with the exceptions particularized elsewhere, cannot be sold or parted with, without waiver of the right already possessed (2). Carriers, and all persons entitled to a general or particular lien, should therefore expressly stipulate for a power to sell the same, and prescribe the terms of sale, in case the lien be not satisfied (3). There is nothing to affect the right of parties to attach conditions to this effect. A consent by the person depositing, may

(1) *Green* v. *Shewell*, mentioned by Mr. Baron Parke in *Scarfe* v. *Morgan*, 4 Mee. & W. 277.

(2) *Jones* v. *Pearle*, Str. 556; *ex parte Shank*, 1 Atk. 254; *Kruger* v. *Wilcox*, Ambl. 252; *Wilkins* v. *Carmichael*, Doug. 97; Judgment of Buller, J., 6 East, 25, *in notis*; *Sweet* v. *Pym*, 1 East, 4; *M'Combie* v. *Davies*, 7 East, 5.

(3) Chit. Gen. Prac. vol. 1, p. 492; in which a form of an agreement, containing such stipulation, is suggested.

indeed be implied in some cases, as will be shown hereafter (1), where goods are distinctly deposited, by way of pledge, for a loan of money; for such deposit constitutes more than a mere right of lien; and it is to be inferred that the contract between the parties is, that if the borrower do not repay the advance, the lender shall be at liberty to reimburse himself by the sale of the deposit (2).

Property held as a lien cannot be taken in execution.

Property, held as a lien, is not liable to be taken in execution, under a writ of *fieri facias*, for the sheriff cannot substitute, as the owner of the goods, a third person between whom and the original owner there is no privity. It is quite clear, observes Parke, B., in a very recent case (3), that, by the general law, a sheriff can seize nothing in execution but what he can sell. That law still remains, save so far as altered by the statute 1 and 2 Vict. c. 110, s. 12 (4), which is not applicable to the point in question. A lien is a personal right to hold the goods of another party, by way of pledge, until a debt is paid. The right of the bailee is altogether personal; he cannot dispose of the goods to another, nor can the sheriff do so, on subsequently obtaining possession of them. The right of lien continues so long only as the goods remain in the possession of the party as a pledge, pursuant to the terms of the original delivery: it is a right altogether personal. In this respect, the case differs from a term of years, which may be sold, because, being a valuable interest, it is a legitimate subject of sale.

(1) See title "Pawn," *post*.

(2) Holt, C. N. P. 383.

(3) *Legg* v. *Evans*, Exchequer, Hil. T. 1840. See Jurist, vol. 4, p. 197; and see *Nathan* v. *Giles*, 5 Taunt. 557; and Vin. Abr. tit. Pawn (A), 3.

(4) "An Act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England." Sec. 12 empowers the sheriff to seize money, bank-notes, bonds, &c., and to pay them over to the execution creditor.

Here, the lien is an interest, which the bailee cannot hand over to any one, unless perhaps to a servant, who impliedly holds on behalf of the bailee, without being guilty of a conversion. If therefore the goods cannot be sold, neither can they be seized; for nothing is by law seizable that may not afterwards be sold.

Party claiming lien bound to exercise care in its preservation.

If a lien exist upon a perishable article, the party claiming the lien is bound to exercise every care in the preservation of it; so, if upon a horse, he is bound to feed it, for the liability is analogous to that of preserving a chattel, which arises in the case of a beast impounded, and corn distrained at common law (1).

Whether necessary to plead lien specially, in actions in *trover*.

Since the adoption of the new rules relating to pleading (2), it has been questioned whether, under the plea of "not guilty," *in trover*, when the plaintiff relies upon a demand and refusal, to prove a conversion, the defendant can give evidence of a lien, or the right of lien must be specially pleaded (3). Before such period, the plea of "not guilty" enabled a defendant to prove, either that he had not detained, or meddled with, the goods (the subject of the action) at all, or, in such manner as to constitute a conversion in fact; or, that the plaintiff had no property, or no right of possession, as against the defendant, at the time of the alleged conversion (4); or, admitting a conversion in fact, that the conversion was justifiable (5). The plea of lien was therefore admissible under this plea.

Former effect of plea of "not guilty."

(1) *Scarfe* v. *Morgan*, 4 Mee. & W. 270; 1 Horn & H. 292, *S. C.*

(2) Reg. Gen. Hil. Term, 4 W. 4.

(3) See *Stancliffe* v. *Hardwick*, 2 Cr. M. & R. 1; 3 Dowl. 762; *Vernon* v. *Shipton*, 2 Mee. & W. 9.

(4) Bro. Abr. *Accion sur le case*, pl. 109; *Bloxam* v. *Saunders*, 4 B. & C. 941; 7 Dow. and Ry. 896, *S. C.*

(5) Com. Dig. Action on the case upon trover (F. 2). In some cases, the defendant was *at liberty* to plead specially. 1 Chitty on Pleading, 499, 529, 6th Edit.; and see *Kennicott* v. *Bogan*, Yelv. 198, contrary to *Astue* v. *Saunderson*, Cro. Eliz. 434.

Present effect of such plea.

Now, however, the plea "admits the plaintiff's right to recover something against the defendant, if he can prove what the law would deem a conversion of the plaintiff's property in the goods in question"(1); and its operation is restricted to a denial of *the fact* of conversion only, without regard to its legality or illegality (2). There is, therefore, no difficulty in the application of the rule, where the plaintiff's evidence shows an act, amounting *per se* to a conversion, although the conversion may be rightful. In *Stancliffe* v. *Hardwick* (3), where the plaintiff, a wharfinger, and the defendant, a carrier, had agreed to set up a waggon in common, and that each party should supply two horses; and upon the dissolution of the concern, a dispute arising as to the two horses supplied by the plaintiff, he brought an action of *trover* to recover the value of them from the defendant, who had seized and sold them for the alleged purpose of paying the partnership debts: it was held, that this defence could not be given in evidence under the plea of "not guilty," but that the defendant ought to have pleaded in confession and avoidance. In *Vernon* v. *Shipton* (4), which was *trover* for a number of boxes of tin plates, the pleas were—

(1) See the judgment in *Stancliffe* v. *Hardwick*, 2 Cr. M. & R. 1; 3 Dowl. 762, *S. C.*

(2) *Ibid.*; and see Reg. Gen. Hil. Term, 4 W. IV., Pleadings in particular actions, No. 4. The rule is as follows:—"In actions on the case, the plea of 'not guilty' shall operate as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea: all other pleas in denial shall take issue on some particular matter of fact alleged in the declaration." In illustration of the intended operation of the rule, it is added—"In an action on the case, for obstructing a right of way, such plea will operate as a denial of the obstruction only, and not of the plaintiff's right of way; and in an action for converting the plaintiff's goods, *the conversion only*, and not the plaintiff's title to the goods." It is also required that—"All matters in confession and avoidance shall be pleaded specially, as in actions of *assumpsit*."

(3) 2 Cr. M. & R. 1; 3 Dowl. 762.

(4) 2 Mee. & W. 9.

1. Not Guilty. 2. That the plaintiff was not possessed, &c. The plaintiff had sold 1500 boxes (of which the boxes in question were part) to *Saunders*, to whose order they lay at the defendant's wharf. Upon a complaint by *Saunders*, the plaintiff agreed to take back the boxes in question, and *Saunders* sent the defendant an order to deliver them to the plaintiff. *Saunders* having engaged to supply *H.* with a number of boxes, it was proposed by the plaintiff that the boxes in question should go in part performance of that engagement; and *Saunders* accordingly gave the defendant another order to deliver them to *H.*, which was done. Some disputes arising between the plaintiff and *Saunders*, the plaintiff called on the defendant to deliver the boxes to him, pursuant to the first delivery order. Patteson, J., before whom the case was tried, held that the evidence was admissible under the second plea, viz., that the plaintiff was not possessed, but that it was not admissible under the plea of "not guilty;" and, under his lordship's direction, a verdict was found for the plaintiff on the issue under the lastly-mentioned plea, and for the defendant, upon the other issue. The Court (of Exchequer) afterwards confirmed this ruling.

In both the cases which are here mentioned, conversions *in fact* were proved. But a refusal to deliver upon demand, though considered by Lord Holt to be an actual conversion (1), is now settled to be only presumptive evidence of it, and may be rebutted by other evidence to the contrary (2). A distinction may perhaps be taken between the cases of qualified and absolute refusals. In cases where the refusal is qualified, *ex. gr.*, where the finder of goods, ignorant of the true owner, refuses to deliver them to him, until he shows a proper title (3), it

(1) *Baldwin* v. *Cole*, 6 Mod. 212; Holt, 707.
(2) 10 Rep. 56, *b*, 57, *a*; 2 Wms. Saund. 47, *e*, (*note*); Bull. N. P. 44.
(3) See *Green* v. *Dunn*, 3 Camp. 215 (*n*); *Solomon* v. *Dawes*, 1 Esp. 83.

may be said that upon evidence, on the plaintiff's part, of his ownership, and of the defendant's refusal, on the alleged ground of his having found the goods, and being ignorant of the plaintiff's title, the defendant would be at liberty to prove the truth of his excuse, under the plea of "not guilty," because the evidence would not set up any title of property or possession, adverse to the plaintiff's, but would amount to a disclaimer of all right or interest, and imply a readiness and willingness to deliver the goods to the rightful owner, when ascertained; and therefore would merely neutralize the plaintiff's evidence, and exclude any inference of *the fact* of conversion. Perhaps, however, the true objection might be, that the plaintiff's evidence did not, of itself, amount to any proof of a conversion in fact (1). On the other hand, in cases in which the refusal is absolute and peremptory, and the reason, whether declared or not at the time, is that the defendant has a lien, evidence of a detainer on the ground of lien will not render insufficient the plaintiff's evidence to prove *the fact* of conversion; but, on the contrary, will of itself show a conversion in fact, *i. e.*, a detainer for the defendant's own benefit, under a legal authority. Such evidence, indeed, would be objectionable, as tending to disprove the plaintiff's possessory right, which is admitted by the plea of "not guilty," according to the effect now given to it. In *Barton* v. *Brown* (2), it was held that the defendant could not, under this plea, set up an *absolute* property in himself, although the only evidence of conversion was a demand and refusal; and the case of lien seems to be within the same principle.

Special plea of lien not absolutely necessary *in trover*.

But, although, under the plea of "not guilty," a lien

(1) See the cases cited *ante*—10 Rep. 56, *b*, 57, *a*; 2 Wms. Saund. 47, *e*, (*note*); Bull. N. P. 44; *Alexander* v. *Southey*, 5 B. & Ald. 247; *Gunton* v. *Murie*, 2 B. & B. 447; S. P. *Wilson* v. *Anderton*, 1 B. & Ad. 450.

(2) 5 Mee. & Wels. 298.

may not be proveable, it does not follow that a special plea of lien is necessary. A right of possession is part of the essence of a lien; and the lien depends upon the possession (1). The defence of lien, therefore, is a denial of the plaintiff's possessory right, without which he cannot maintain his action (2). A plea traversing this right seems to be more appropriate than a special plea of lien, which amounts to an argumentative denial. In *Oliver* v. *Knight* (3), which was an action in trover for an indenture of lease, it was held that the defendant might give in evidence, under a plea that the plaintiff was not possessed, &c., that the plaintiff had delivered the indenture in question to a person, in order to raise money, and that he assigned it to the defendant as a security for money advanced, and which had not been paid. In *Jackson* v. *Cummins* (4), which was an action of trespass for seizing and driving away cows, to which the defendant pleaded two distinct grounds of lien, viz., by force of an agreement, and by the general law, Parke, B., says—"I think that, after the recent decision in *Owen* v. *Knight*, as to the effect of lien in actions of *trover*, the defendant would have done better to have pleaded that the plaintiff was not possessed of these cows; which plea would have been supported by proof of the lien, giving to the defendant a special property in them at the time of the trespass." Special pleas of lien have, however, been allowed to be

Plea, traversing possessory right, more proper.

(1) *Hutton* v. *Bragg*, 7 Taunt. 14; *Swift* v. *Pim*, 1 East, 4. As to the power of factors and agents to confer a right of lien co-extensive with their own right, upon third parties, see *post*, tit. "Factors and Brokers."

(2) *Gordon* v. *Harper*, 7 Term. Rep. 9; *Bloxam* v. *Saunders*, 4 B. & C. 941; 7 D. & R. 896, *S. C.*; *Owen* v. *Knight*, 4 Bing. N. C. 54; 5 Scott, 307; 6 Dowl. 244, *S. C.*

(3) 4 Bing. N. C. 54; 5 Scott, 307; 6 Dowl. 244.

(4) 5 Mee. & Wels. 342. See also *Vernon* v. *Shipton*, 2 Mee. and Wels. 9; and *Samuel* v. *Morris*, 6 Car. & P. 620.

pleaded (1), and perhaps may be unobjectionable, as giving implied colour (2).

Necessity to plead lien specially *in detinue*.

As before the making of the new rules, it was requisite *in detinue*, to plead a lien specially, so it would appear that it is equally necessary now (3). A defendant might formerly have given in evidence, under the plea of *non detinet*, a gift from the plaintiff, "for that proveth he detaineth not the plaintiff's goods" (4); but such evidence, it is clear, would not now be admissible under that plea (5).

Recovery of

If a party has possession of goods or other property,

(1) *Jaulery* v. *Britton*, 4 Scott, 380; *Bruce* v. *Wait*, 3 Mee. and Wels. 15.

In *Leuckhart* v. *Cooper*, 1 Bing. N. C. 509; 1 Hodges, 16, *S.C.*, the following pleas were allowed:—

1st. The general issue.

2ndly. A general lien by custom for up-town warehousemen, in respect of their general balance against any individual housing goods with them; and that the goods, the subject of the action, were housed at the defendant's by one H., who was indebted to them on a general balance.

3rdly. A lien against H. by special agreement.

4thly. That the plaintiff sent the goods in question to H., with such powers as to give him all the *indicia* of property; and that, therefore, the defendants had a right to insist on the custom mentioned in the second plea, as against H.

5thly. The custom in the second plea, set up as applicable to a debt due to the defendants from the plaintiff.

In *Marks* v. *Lahee*, 3 Bing. N. C. 408; 4 Scott, 137, *S. C.*, a plea was allowed, that defendant, on divers days and times, was retained and employed to engrave divers etchings for hire, and that defendant detained certain copper-plates for his lien in respect of the said work.

(2) See Chitty on Pleading, 499, 529.

(3) *Alexander* v. *M'Gowan*, 1 Chitty on Pl. 124, 6th Edit.; and see Co. Litt. 283, *a*; *Phillips* v. *Hayward*, 3 Dowl. 362.

(4) Co. Litt. 283, *a*.

(5) With regard to *detinue*, the rule is—"The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea. Reg. Gen. Hil. Term, 41 W. 4, No. 3.

belonging to another, which he refuses to deliver, unless the latter pays him a sum of money, which he has no right to receive, and such sum be consequently paid, this amounts to a compulsory payment, and may be recovered back in an action for money had and received (1); nor is it material that there should be any pressing necessity for the goods at the time they are demanded. Two modes therefore present themselves, under which an owner of property may try the validity of the holder's claim. If the necessity for possession be urgent, he may pay the money demanded under protest, and bring an action of *assumpsit* for the recovery of it back; or, if he have no immediate necessity for the property, he may try the question in an action of *trover*, and leave the holder to establish his claim of lien.

money paid under illegal claim of lien.

The effect of the bankruptcy of the party against whom the claim of lien is sought to be established, remains next to be considered.

Bankruptcy of party against whom lien claimed.

It has been observed elsewhere, that when goods have been received by a factor, prior to any act of bankruptcy by his principal, the mere receipt of money subsequently to it, will not defeat his right of lien (2). It was however formerly held, that if a trader, even after a secret act of bankruptcy, consigned goods to a factor, who, in pursuance of an agreement to that effect, accepted and paid bills drawn on him by the trader, and a commission afterwards issued against the trader, on such prior act of bankruptcy, the factor was answerable to the assignees for the value of the goods sold subsequently (3).

Receipt of goods prior to act of bankruptcy and subsequent sale, valid.

Formerly receipt of goods after *secret* act of bankruptcy, gave no title to lien.

But where a security, given prior to such secret act of bankruptcy, was substituted by a new security, as in the

But where a bill given prior to such secret

(1) *Shaw* v. *Woodcock*, 7 B. & C. 73; 9 D. & R. 889, *S. C.*; *Mestaer* v. *Atkins*, 5 Taunt. 381.

(2) *Robson* v. *Kemp*, 4 Esp. 236; *Drinkwater* v. *Goodwin*, Cowp. 251.

(3) *Copland* v. *Stein*, 8 T. Rep. 199; and see *Foxcroft* v. *Devonshire*, 2 Burr. 931.

act, substituted by a new bill subsequent thereto, payment by third party held good.

following instance, the transaction was deemed valid and binding on the assignees. A trader being indebted to the defendants, and having indorsed to them a bill of exchange, previously to the commission of any act of bankruptcy, secretly committed such act, and then gave them a new bill, in lieu of their former claim, and deposited with them certain policies of insurance, made on his account, as collateral security. After notice of a loss upon the policies, the policy-broker, at the bankrupt's request, gave his own acceptance to the defendants (which was afterwards paid), in order to induce them to give up their lien on the policies, and a commission of bankruptcy, some time after, issued against the trader, on the prior act of bankruptcy; it was held, that the assignees could not recover from the defendants the amount of the broker's acceptance paid to them, though the broker, in settling his account with the assignees, retained the amount of the money so paid by him to the defendants, in order to get possession of the policies (1). This judgment proceeded, however, on the ground that the broker was personally liable to pay the acceptance he had given to the defendants, whether he had received the amount of the policies from the underwriters or not; and that, therefore, the payment was made by him out of his own money.

46 Geo. 3, c. 135.

The 46 Geo. 3, c. 135, was afterwards passed, materially altering the law upon this subject (2), and rendering valid all *bonâ fide* contracts, dealings, and transactions,

(1) *Hovil* v. *Pack*, 7 East, 164.

(2) Though not immediately connected with the subject under consideration, I may observe that a recent statute, the 2nd Vict. c. 11, s. 12, entitled "An Act for the better protection of purchasers against judgments, crown debts, *lis pendens*, and flats in bankruptcy," has declared all conveyances by any bankrupt, *bonâ fide* made and *executed before the date and issuing of the flat*, to be valid, notwithstanding any prior act of bankruptcy; provided the party to whom the conveyance is made, had not, at the time, notice of such act of bankruptcy. And by sect. 13, no purchase for valuable consideration

made or entered into more than two calendar months before the date of the commission of bankruptcy, provided the party dealing with the bankrupt had *no notice of any prior act of bankruptcy* committed by him. A later statute, 6 Geo. 4, c. 16, which repeals the former act, contains a similar protective clause, in the following words: "That all conveyances by, and all contracts and other dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two calendar months before the date and issuing of the commission against him, and all executions and attachments against the lands and tenements or goods and chattels of such bankrupt, *bonâ fide* executed or levied more than two calendar months before the issuing of such commission, shall be valid, notwithstanding any prior act of bankruptcy by him committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account, such execution and attachment shall have issued, had not, at the time of such conveyance, contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that where a commission has been superseded, if any other commission shall issue against any person or persons comprised in such first commission, within two calendar months next after it shall have been superseded, no such conveyance, contract, dealing, or transaction, execution or attachment, shall be valid, unless made, entered into, executed or levied, more than two calendar months before issuing the first commission."

6 Geo. 4, c. 16. Conveyances, contracts, executions, &c. made or levied without notice of act of bankruptcy two months before commission, valid.

If commission issued within two months be superseded and another issue, two months to be calculated from issuing of first commission.

Under the former of these statutes, ship-brokers, holding the papers of a vessel, by way of lien, for disbursements on account of the ship, have been held to be

shall be impeached, by reason of any act of bankruptcy, *of which the purchaser had notice*, unless the commission against the bankrupt shall have been sued out within twelve calendar months after it.

entitled to an adjustment of their accounts, and to retain the balance due to them on delivering up the papers, though the ship-owner had been then arrested, and in prison more than two months (1); for the brokers having a clear lien on the ship and papers, would not have given them up without payment of the balance due to them; and the assignees, standing in the bankrupt's place, could not, after obtaining the ship and the papers, without which the ship was not saleable, turn round and divest the brokers of the money they might have secured to themselves, by retaining the ship in their possession.

6 Geo. 4, c. 16. Payments by and to bankrupt, without notice of act of bankruptcy, valid.

By the 82nd section, 6 Geo. 4, c. 16, it is enacted, "That all payments really and *bonâ fide* made, or which shall hereafter be made, by any bankrupt, or by any person on his behalf, before the date and issuing of the commission against such bankrupt, to any creditor of such bankrupt (such payment not being a fraudulent preference of such creditor), shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and all payments really and *bonâ fide* made, or which shall hereafter be made to any bankrupt, before the date and issuing of the commission against such bankrupt, shall be deemed valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; and such creditor shall not be liable to refund the same to the assignees of such bankrupt; provided the person so dealing with the said bankrupt had not, at the time of such payment by or to such bankrupt, notice of any act of bankruptcy by such bankrupt committed."

This section has so far protected payments, in the usual course of business, as to create a lien on the goods for the amount paid for their purchase; for the statute does not protect the actual sale and disposition of the property, but renders the payment of the price so far effectual, as to enable the persons paying, to retain the

(1) *Thompson* v. *Beatson*, 1 Bing. 145.

goods as long as they are kept out of their money. Nor does it extend to the protection of transactions, where the delivery of the goods has been by way of security for an antecedent debt (1).

In ascertaining the validity of such dealings, and the right of the party by whom the payment has been made, to a lien on the goods delivered, a jury may consider whether the payments were made fairly and honestly, in the course of an honest transaction; or whether there was such a degree of suspicion attending the sale, as to put a prudent and cautious man upon his guard. Thus, where traders, in embarrassed circumstances, directed one of their shopmen to remove large quantities of goods to his lodgings, and to sell them at twenty-five per cent. under prime cost; and, in consequence of an application from the shopman, who stated that they were the goods of his employers, but disclosed no names, a person called and made several large purchases; the jury found that the traders, who had become bankrupts, intended to defraud their creditors, and that the purchaser had not made such inquiries as common prudence and honesty would have dictated: and in an action, brought by the assignees, it was held, that they were entitled to recover the whole of the goods (2).

Transactions in the ordinary course of business.

It is only therefore where transactions have taken place *bonâ fide*, in the ordinary course of business, that they will not be vitiated on the ground of an act of bankruptcy unknown to a party (3). The price paid must, under such circumstances, be tendered by the assignees before they can entitle themselves to recovery of the specific goods (4).

Not necessary that the goods

But it is not necessary that the goods purchased should be of the kind usually sold by the bankrupt in

(1) See *Smith* v. *Moon*, M. & M. 458.
(2) *Devas* v. *Venables*, 3 Hodg. 9; 3 Bing. N. C. 400, *S. C.*
(3) *Ward* v. *Clarke*, M. & M. 497; *Cook* v. *Caldecott*, *ibid.* 522.
(4) *Hill* v. *Farnell*, 9 B. & C. 45.

should be of the kind usually sold by the bankrupt.

the course of his trade. For where a person purchased and paid for a library of books, from a hop-merchant, who had previously committed an act of bankruptcy, of which the former had no knowledge, it was held, that this was a valid payment within the meaning of the statute, and that the assignees could not recover the books without tendering the price; for to give full effect to that enactment, the purchaser must at least have a lien on the books, in respect of which he had made the payment, until the assignees tendered him the sum paid (1).

The statute, it has been seen, protected only *payments* between the commission of the act of bankruptcy and the issuing of the fiat, and embraced no other transactions but such as were executed two months prior to the latter period.

2 Vict. c. 29. All contracts, &c. *bonâ fide* made by and with any bankrupt *previous to the date of fiat*, to be valid, if no notice had of prior act of bankruptcy.

A yet more recent statute, 2 Vict. c. 29, entitled "An Act for the better protection of parties dealing with persons liable to the Bankrupt Laws," has enacted, "That all contracts, dealings, and transactions, by and with any bankrupt really and *bonâ fide* made and entered into, before the date and issuing of the fiat against him, and all executions and attachments against the lands and tenements, or goods and chattels of such bankrupt, *bonâ fide* executed or levied *before the date and issuing of the fiat*, shall be deemed to be valid, notwithstanding any prior act of bankruptcy by such bankrupt committed; provided the person or persons so dealing with such bankrupt, or at whose suit, or on whose account such execution or attachment shall have issued, had not, at the time of such contract, dealing, or transaction, or at the time of executing or levying such execution or attachment, notice of any prior act of bankruptcy by him committed; provided also, that nothing therein con-

(1) *Hill* v. *Farnell*, 9 B. & C. 45; but see *Cannan* v. *Deneve*, 10 Bing. 292; and *Wright* v. *Fearnley*, 5 Bing. N. C. 89, where an actual pledge held not to be protected by the statute.

tained should be deemed or taken to give validity to any payment made by any bankrupt, being a fraudulent preference of any creditor or creditors of such a bankrupt, or to any execution founded on a judgment on a warrant of attorney or cognovit given by any bankrupt, by way of such fraudulent preference."

The time therefore within which parties may acquire a valid right to goods, by purchase or lien, has been extended to the actual date and issuing of the fiat in bankruptcy. The *bona fides* of transactions between parties will be tried by the same test as under former statutes. They may be invalidated by actual knowledge of an act of bankruptcy, by absence of common prudence and proper inquiry, or by fraudulent preference (1); and in no case can a title to lien accrue from possession obtained subsequently to the issuing of the fiat.

Apparent ownership by bankrupt may exist under certain circumstances without defeating lien.

The 72nd section of the Bankrupt Act, 6 Geo. 4, c. 16, vests in the assignees of a bankrupt all goods and chattels which, at the time he becomes bankrupt, shall, with the consent and permission of the true owner, be in his possession, order, or disposition; or of which he may be the reputed owner, or have taken upon him the sale, alteration, or disposition, as owner. Yet a bankrupt may have a limited possession or enjoyment of articles upon which a right of lien exists in another, without necessarily destroying the validity of such right. No precise rule can be laid down as to the kind of possession required to have been vested in a party claiming the lien, prior to the bankruptcy. Each case depends much upon its own circumstances. Such circumstances may render the *absolute* delivery of possession by the bankrupt altogether impracticable, as, for instance, in case of a deposit of articles, subject to the special use of the bankrupt, but which are meanwhile to remain upon the premises of the person with whom the conditional deposit has been made;

(1) *Crosby* v. *Crouch*, 2 Camp. 166; *Alderson* v. *Temple*, 4 Burr. 2235; *Wilson* v. *Balfour*, 2 Camp. 579.

yet this would be deemed sufficient delivery of possession to give legal effect to the agreement (1). Thus, where a contractor for the performance of certain public works, over which the engineer of the company had the superintendence, brought upon the premises of the company steam-engines, railroads, materials and implements, necessary for carrying on the works, and during the progress of them obtained advances by the company, beyond the sums he was entitled to receive, referring them by letter to such articles, stating the particulars of which they consisted, and offering them as their security for those advances, it was held, on the bankruptcy of the contractor, that there was sufficient possession in the company to support the lien upon all such matters as were delivered upon the premises prior to the bankruptcy (2). A more exclusive possession on the part of the company would not only have been inconsistent with, but have entirely defeated, the object of the advances which it was the purpose of the lien to secure. It was such as the nature of the transaction would only admit, and brings the case within the exceptions that have been established, in regard to property placed in the hands of a trader for a specific purpose, and not passing to the assignees, upon his bankruptcy.

The consideration of the numerous cases upon this subject would be foreign to my purpose. It may suffice to have pointed out the nature of the exception that, under particular circumstances, has been allowed to prevail, and the distinction which exists between the continuance of actual possession in the bankrupt, and a mere permissive user of the articles on which the lien is claimed, consistent with the terms of the deposit.

(1) See *Collins* v. *Forbes*, 3 Term Rep. 316.

(2) *Crowfoot* v. *London Dock Company*, 2 Cr. & M. 637; and see *Hawthorn* v. *The Newcastle-upon-Tyne and North Shields Railway Company* (when reported), argued Q. B. Easter Term, 1840, which was a case arising under a claim of lien, vested in a Railway Company, by the terms of a deed executed by one of the contractors, but upon which judgment has not yet been delivered.

CHAPTER III.

EXPRESS PLEDGES OR PAWNS.

Express pledge or pawn.

In addition to the species of lien which I have endeavoured to define under the distinctive titles of general and specific, or particular lien, I may advert also to that, distinguished by the term *pledge or pawn*, which is created by the owner of personal property, by the mere delivery of it to a second party, upon an express or implied understanding that it shall be retained as security for any existing or future debt (1).

The right of lien arises by operation of law, but a pledge is a lien arising by contract (2), created, limited, and enlarged, at the will of the contracting parties.

(1) As it is not my intention to enter into a discussion of the law relating to pawnbrokers, I shall merely refer to the statute 39 & 40 George 3, c. 99, which regulates their business, rights, duties, and liabilities.

This statute entitles a pawnbroker to sell the pledges in his hands by public auction, after the expiration of a year and a day, unless the pawnor give a notice to the contrary, in which case the sale must be postponed for three months; but he is bound, even after the expiration of the former period, to return the pledge, on payment of the principal and interest, if he has neglected to sell previously to such payment. *Waller* v. *Smith*, 5 B. & Al. 439; 1 D. & Ry. 1, *S. C.*

All contracts entered into between pawnbrokers and parties who pledge goods, in which the requisites prescribed by the 6th section of the statute, to precede, and accompany, and make out the contract, are not complied with, are void; and the transaction itself being void, it necessarily follows that no property passes to the pawnbroker in the thing pledged, and he cannot maintain a lien on them against the assignees of a pawnor who afterwards becomes bankrupt. *Fergusson* v. *Norman*, 5 Bing. N. C. 76.

A pawnbroker has no lien on plate after the death of a tenant for life who pawned it with him, as against the remainder-man, although he had no notice of the settlement. *Hoare* v. *Parker*, 2 Term Rep. 376.

(2) *Wilson* v. *Heather*, 4 Taunt. 642; *Gladstone* v. *Birley*, 2 Mer. 404.

Origin of pledges.

" Pledges are of ancient origin. Things were lent *sub vadii positione ;* and then either moveables, as chattels, or immoveables, as lands, tenements, and rents, were given in pledge. When moveables were pledged, and seizin thereof, as it is called, was given to the creditor, for a certain term, the law required that he should safely keep it, without using it so as to cause any detriment thereto ; and if any detriment happened to it, within the term appointed, it was to be set off against the debt, according to the damage sustained. If the thing pledged was such as necessarily required some expense and cost, as to be fed or repaired, perhaps there would be some agreement between the parties about it ; and that agreement was to be the rule of such contingent expenses. It was sometimes agreed, that if the pledge was not redeemed at the term fixed, it should remain to the creditor, and become his property. If there was no such agreement, the creditor might quicken the redemption by the following writ : *Rex vicecomiti salutem. Præcipe N. quòd justè et sine dilatione acquietet, &c. quam invadiavit R. pro certum marcis usque ad terminum qui præteriit, ut dicit, et unde queritur quod eam nondum acquietavit : et nisi fecerit,*" &c. (1).

" It was doubted by Glanville, in what manner the defendant was to be compelled to appear to this writ ; whether he was to be distrained by the pledge itself, or in what other way. This, it seems, was left to the discretion of the court ; and might be effected, either by that or some other method. He ought, however, to be present in court before the pledge was quit-claimed to the creditor ; for he might be able perhaps to show some reason why it should not. If he then confessed his having pledged the thing, as he thereby, in effect, confessed the debt, he was commanded to redeem it in some reasonable time ; and if he did not, the creditor had

(1) Glanv. lib. 10, c. 8.

licence to treat the pledge as his own property. If he denied the pledging, he must either say the thing was his own, and account for its being transferred out of his possession, as lent or entrusted to him, or deny it to be his; and then the creditor had licence to consider it as his own property. If he acknowledged it was his, but denied the pledge and debt both, then the creditor was bound to prove both; but the debt could not be demanded before the expiration of the term agreed upon."

"If the pledge was made without mention of any particular term, the creditor might demand his debt at any time. When the debt was paid, the creditor was bound to restore the pledge in the condition he received it, or make satisfaction for any injury that it had received; for it was a rule that the creditor was to restore the pledge, or make satisfaction for it; if not, he was to lose his debt" (1).

A pledge or pawn is, in general, created by the delivery of goods into the special custody of the creditor himself. It is, however, equally valid and binding in its nature, though the property be deposited by the owner in the hands of a third party, as a security to the creditor; for such party, though otherwise unconnected with the latter, may be so far considered as his servant for keeping possession of the property, as to render the transaction a sufficient and binding pledge. Thus, where the owner of a ship had assigned it, together with a policy of insurance thereupon, to his creditor, but the broker in whose hands the policy was, refused to deliver it up on the ground of a lien, and it was agreed between the owner and the creditor, that it should remain in the broker's hands as a security to the creditor, the Lord Chancellor observed—

Pawn may be delivered to a third person, as servant or agent of pawnee.

(1) Glanv. lib. 10, c. 8; 1 Reeves' Eng. Law, 162.

"There seems to me to be no difference between cases where effects which have been in the possession of the pawnor are pledged, and cases where goods, which he has a property in, are left in the hands of a third person. I consider them equally as pledges (1). And where the captain of a ship pledged his chronometer, then in the possession of the makers, to defendants, who were the owners of the ship, in consideration of their advancing him £50, and allowing him the use of the instrument during a voyage on which he was about to depart; but, after the voyage, he placed it at the makers, and there pledged it to the plaintiff, for whom the makers, being ignorant of the pledge to defendants, agreed to hold it; the money advanced by defendants not having been repaid, it was held, that the property in the instrument was in the defendants (2).

Pawnee acquires a special property in article pledged.

Upon the pawn being thus actually or constructively delivered to the pawnee, he acquires a special property in the thing pawned, conferring the right of detention until it is redeemed, the general property still remaining in the pawnor (3).

Pawnor may limit or extend pledge at his will.

The extent of the pawnee's rights and remedies in respect of the pawn thus voluntarily placed in his hand, must necessarily be dependent upon the agreement or understanding of the parties themselves. It may be specific, or general, and subjected to such restrictions or

(1) *Falkener* v. *Case*, 1 Bro. C. C. 121. In *ex parte* Coming, 9 Ves. Jun. 115, the Lord Chancellor observes—"No case has gone the length, *though I do not see the reason*, that if the deposit is in the hands of a person who could fairly be called a third person abstracted from both, that can be considered as a deposit for the creditor, provided that is proved to be the intention."

(2) *Reeves* v. *Capper*, 5 Bing. N. C. 136; 1 Arn. 427, *S. C.*

(3) *Coggs* v. *Bernard*, Ld. Raym. 909. A bill of exchange may be deposited by a debtor, by way of pledge, without putting his name to it. *Ex parte* Hustler, 3 Mad. 117: *ex parte* Whitten, *ex parte* Smith, *ex parte* Roberts, Co. B. L. 139. *Sed vide* this case on appeal, 1 G. & J. 9; 5 Mad. 165, *S. C.*

conditions as the pawnor may choose to impose. Thus, it may extend to pre-existing debts, to present or to future loans, or to either, independent of the others. How far a subject which is pledged as a security for a debt already due, may be considered as a security for further loans, *where there is no express agreement to that effect*, must, from the nature of the thing, depend upon the circumstances of each particular case. If it can be presumed from these, that the ground and inducement upon which the pawnee advanced the further loans was his having a pledge in his hands, a court of equity will not suffer the pledge to be redeemed without payment of all the sums advanced (1). Thus, where a loan of money was effected on the pawn of jewels, and afterwards three more several sums were borrowed, for each of which the pawnor gave his note, *without taking notice of the jewels*, it was determined that, after the decease of the borrower, his executors should not redeem the jewels without paying the money due on the notes, for it was to be presumed that the ground and foundation of the pawnee's lending his money, was his having a pledge in his hands, and there could be no pretence to say it would have been a lien if the money had been lent before the delivery of the goods (2). But, if the circumstances of the case warrant no contrary presumption, the pawnee will only be allowed to retain for the debt for which the pledge was specifically made (3); for there is no rule, either at law or in equity, where a man, having security from another for a loan already made to him, advances more money to the same person, that the latter shall either pay the lender the whole debt, or not redeem at all. And if any transaction takes place between the pawnor and the pawnee, by which the latter

How far a pawn may extend to subsequent advances.

If no contrary presumption, pawnee can only retain for original debt.

So, if he acknowledges, he holds for one sum only.

(1) *Ex parte* Ockenden, 1 Atk. 236.

(2) *Demaindray* v. *Metcalfe*, Prec. in Chan. 419, cited *ex parte* Ockenden, 1 Atk. 236; 2 Vern. 691, *S. C.*

(3) *Ex parte* Ockenden, 1 Atk. 236.

acknowledges that he has only possession of the security for one sum, he shall not afterwards be allowed to claim a lien upon it in respect of another. Thus, where personal securities were pledged for a specific debt, and afterwards a mortgage was made by the pawnor to the pawnee, of an estate, no notice being taken at the time of the debt for which the personal securities were pledged, and some time subsequent to the mortgage, the same securities, together with others, were pledged to the pawnee, for the balance of an account due to him from the pawnor, no notice being taken of the mortgage, redemption of the personal securities was decreed, without compelling the discharge of what was due on the mortgage, because there appeared to have been no intention of tacking the securities to the mortgage, at the time the latter was made; and if such an intention really existed, it was waived by the subsequent pledge of the securities without noticing the mortgage, and the transactions were entirely distinct (1). Upon the same principle, where a banker, being in advance to his employer to the amount of fourteen hundred pounds, afterwards received from the latter securities as a pledge for one thousand only, it was determined that the banker had no lien upon them for more than the thousand pounds (2).

Cannot retain for a greater sum than that specified.

A pledge of property by one partner, without fraud or collusion on the part of the pawnee, will give a right to the latter to hold it against the others. And for the purpose of ascertaining whether the interest of the pawnor amount to a partnership, the language of the correspondence or agreement will be considered, and the intention and understanding of the parties collected from it.

Pledge by a partner, if without fraud on the part of pawnee, binding against others.

(1) *Jones* v. *Smith*, 2 Ves. Jun. 372. The decree in this case was afterwards reversed in the House of Lords, but it is not stated upon what ground. See 6 Ves. Jun. 229, *note* (*d*).

(2) *Vanderzee* v. *Willis*, 3 Bro. C. C. 21; but see *Adams* v. *Clayton*, 6 Ves. Jun. 226.

Thus, where a merchant in London, by letter, directed a broker in Liverpool to purchase 1,000 bales of cotton, and stated that he was to be allowed *one-third interested therein*, acting in the business free of commission, and the broker agreed to the terms, and purchased the cotton; and in the subsequent correspondence, which continued for upwards of three months, the transaction was referred to as a joint account, joint concern, joint purchase, joint speculation, joint cotton adventure; the broker transmitted policies of insurance against loss by fire, to the merchant, and stated that he had deposited the cotton in rooms rented by him, and held the key for their joint security; it was held, that the broker was interested in the cotton, as a partner, and consequently that a pledge of the whole by him, without any fraud or collusion on the part of the pawnee, gave the latter a lien upon it as against the merchant (1). The rule, it seems, is not confined to general partnerships, but extends to particular speculations in which parties are jointly interested; nor is it limited by the particular share or interest to which the pawnor is entitled.

Pawnee may proceed for debt while he retains pawn;

A pawn being a mere collateral security for the payment of a claim, and not a liquidation of it, it follows, that the pawnee is not restrained from proceeding at law, for recovery of the amount due to him, even while he retains possession of the pledge (2). And if default be made in payment, by the pawnor, at the stipulated time, it seems equally settled that he may sell the pledge, and appropriate the proceeds in liquidation of his debt, without previous application to a court of equity (3). Nor

And may sell pawn on default of payment.

(1) *Reid* v. *Hollinshead*, 4 B. & C. 867; 7 D. & R. 444, *S. C.*; and see *Raba* v. *Ryland*, Gow, N. P. C. 132; *Tupper* v. *Haythorne*, *ib.* 135; *ex parte Gellar in re Hutchinsons*, 1 Rose, 297.

(2) Bac. Abr. Bailm. B.; *Anon.* 12 Mod. 564.

(3) *Pothener* v. *Dawson*, Holt, 385; *Lockwood* v. *Ewer*, 9 Mod. 278; *Tucker* v. *Wilson*, 1 P. Wms. 261.

is the pawnee's remedy on such sale confined to the articles in pledge, for he retains a concurrent right of action against the pawnor for the balance undischarged, in case the sale realise a sum insufficient for the liquidation of his claim (1).

Right of pawnee to use pawn.

The pawnee is bound to employ reasonable and ordinary care in the preservation and safeguard of the pawn. If the pawn be such as will be the worse for using, the pawnee cannot use it, as clothes, &c.; but if it be such as will be never the worse, as if jewels for the purpose are pawned to a lady, she may use them; but then she must do it at her peril; for whereas if she keeps them locked up in her cabinet, if her cabinet be broke open and the jewels taken from thence, she will be excused; if she wear them abroad, and is there robbed of them, she will be answerable. And the reason is, because the pawn is in the nature of a deposit; and, as such, is not liable to be used. But if the pawn be of such a nature as the pawnee is at any charge about the thing pawned, to maintain it, as a horse, cow, &c., then the pawnee may use the horse in a reasonable manner, or milk the cow, &c., in recompense for the meat (2).

Bound to restore it on payment of debt, unless lost.

In effect, if a creditor takes a pawn, he is bound to restore it upon the payment of the debt (3); yet it is sufficient if the pawnee use true diligence to restore it, and notwithstanding the loss, he shall resort to the pawnor for the debt (4). But indeed, if the money for which

(1) *South Sea Company* v. *Duncomb*, 2 Str. 919.

(2) *Coggs* v. *Bernard*, Ld. Ray. 909, per Holt, C. J.; and see *Vere* v. *Smith*, 1 Ventr. 121; *Anon.* 2 Salk. 522; *Rex* v. *Cording*, 1 N. & M. 35.

(3) *Isaac* v. *Clarke*, 2 Bulst. 206; *Anon.* 2 Salk. 522; Bull, N. P. 72.

(4) *Creditor, qui pignus accepit, re obligatur, et ad illam restituendam tenetur; et cum hujusmodi res in pignus data sit utriusque gratia, scilicet debitoris, quo magis ei pecunia crederetur, et creditoris quo magis ei in tuto sit creditum, sufficit ad ejus rei custodiam diligentiam exactam adhibere, quam si præstiterit, et rem casu amiserit, securus esse possit, nec impedietur creditum petere. Coggs* v. *Bernard, supra*, Bracton, 99 (*b*).

the goods were pawned, be tendered to the pawnee before they are lost, then the pawnee shall be answerable for them, because the pawnee, by detaining them after the tender of the money, is a wrong-doer, and it is a wrongful detainer of the goods, and the special property of the pawnee is determined (1).

In case of loss of pledges before payment of loan.

So the pawnee, in case of the loss of one of several articles pledged, before such payment or tender, may, on like principle, resort to the residue for the security of his debt (2).

Distinction between mortgages and pawns.

In treating of the general nature of pledges or voluntarily created liens, I shall endeavour to point out the distinction drawn between these and actual mortgages. The word "mortgage" signifies commonly the same thing as the word "pawn;" that is, the appropriation of the thing given for the security of an engagement; and these two words are used indifferently in the same sense. But the word "pawn" is more properly applied to moveable things, which are put into the hands and keeping of the creditor; and the word "mortgage" signifies properly the right acquired by the creditor upon the immoveables which are appropriated to him by his debtor, although he be not put into possession of them (3). Another difference between a mortgage and a pledge is, that the former is an absolute pledge to become an absolute interest, if not redeemed at a certain time; but the latter is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation or the course of trade, to be a lien on them.

Interest of a mortgagee is legal and absolute.

A mortgagee has the legal and absolute interest in the land mortgaged; whereas a pawnee has but a special property in the goods, to detain them for his security. The delivery vests nothing but the bare custody, and it

(1) *Coggs* v. *Bernard*, Ld. Ray. 909; *Ratcliffe* v. *Davies*, Yelv. 179.
(2) *Ratcliffe* v. *Davies*, *supra*.
(3) Domat. lib. 3, tit. 1, sect. 1.

is not like to a mortgage; for then he that hath the interest ought to have the money; but in the case of a pledge, it is only a special property in him that takes it, and the general property continues in the first owner; and upon tender of the money secured by the pawn, by the pawnor, the property, notwithstanding the refusal, is reduced constantly to the pawnor, without claim. The conveyance to the mortgagee, on the other hand, amounts to an immediate sale; and though the mortgagor may buy it again, or redeem, by favour of a court of equity, yet, till then, the mortgagee is the absolute proprietor (1). The essential distinction between mortgages and mere pawns, points out therefore the necessity, in the latter case, of accompanying the act of pledge, by virtual delivery of the goods intended to be pawned. In mortgages, possession of the land is not necessary, though the title-deeds must be delivered; but on a pledge of goods, the transaction will be deemed a nullity, as against assignees, in case of bankruptcy, if the goods are allowed to remain in the possession of the party who pledged them (2).

Rights of assignee of a pledge.

There is moreover this distinction between a mortgage and a pawn. If the pawnor have, as he may do, assigned his property in the pledge, subject to the pawnee's rights and special property, the assignee will have, it is said, the same right as the pawnor, both in law and equity (3); whereas it is clear that the assignee of the equity of re-

(1) See *Ryall* v. *Rolle*, 1 Atk. 168, per Fleming, C. J.; *Ratcliffe* v. *Davies*, 2 Bulst. 30. Yelv. 179. Though *in equity* only a lien is obtained by the mortgage, as long as the power of redemption remains, *at law*, the right of property is transferred, and therefore no lien can exist; for a right of lien necessarily supposes the property to be in some other person; and it is a contradiction in terms to say a man has a lien upon his own property. Per Buller, J., *Lickbarrow* v. *Mason*, 6 East, 25 (*note*).

(2) *Jones* v. *Gibbons*, 9 Ves. 407.

(3) *Kemp* v. *Westbrook*, 1 Ves. 278.

demption in a thing mortgaged could have no rights *at law* (1).

I have before alluded to the incapacity of a party to sell the goods on which a *lien* is claimed. "A *pawn* differs on the one hand from a *lien*, which conveys no right to sell whatever, but only a right to retain until the debt, in respect of which the lien was created, has been satisfied; and, on the other hand, from a *mortgage*, which conveys the entire property of the thing mortgaged, to the mortgagee conditionally; so that when the condition is broken, the property remains absolutely in the mortgagee; whereas the pawn never conveys the general property to the pawnee, but only a special property in the thing pawned; and the effect of a default in payment of the debt by the pawnor is, not to vest the entire property of the thing pledged in the pawnee, but to give him a power to dispose of it, accounting for the surplus; which power, if he neglect to use, the general property of the thing pawned continues in the pawnor, who has a right, at any time, to redeem it" (2). Right to sell pawns.

Numerous cases have established the equitable right of a pawnee to sell, in default of payment, either by the permission of a court of equity, or of his own accord, without any application to such court (3). The produce derivable from such sale must, of course, be applied in discharge of the debt, for which the pledge was security. If it exceed the amount due, the surplus belongs to the pawnor; if, on the contrary, it prove insufficient to sa-

(1) Smith's Leading Cases, vol. 1, p. 100.

(2) *Ibid*; and see Com. Dig. Mortgage, B.; *Waller* v. *Smith*, 5 B. & Al. 439; *Kemp* v. *Westbrook*, 1 Ves. 278; *Demaindray* v. *Metcalf*, Prec. Chan. 420; 2 Vern. 691; *Vanderzee* v. *Willis*, 3 Bro. 21; *Ratcliffe* v. *Davies*, Yelv. 178; *Pothener* v. *Dawson*, Holt, 383.

(3) *Pothener* v. *Dawson*, Holt, 385; *Tucker* v. *Wilson*, 1 P. Wms. 261; *Lockwood* v. *Ewer*, 9 Mod. 278; 3 Atk. 303.

tisfy the pawnee's claim, the deficiency remains recoverable against the pawnor (1).

Pledges by bankrupts, 6 Geo. 4, c. 16, s. 70.

With respect to pledges by bankrupts, it is enacted by the 6 Geo. 4, c. 16, s. 70, that "if any bankrupt shall have granted, conveyed, assured, *or pledged*, any real or personal estate, or deposited any deeds, such grant, conveyance, assurance, *pledge or deposit*, being upon condition or power of redemption at a future day, by payment of money, or otherwise, the assignees may, before the time of the performance of such condition, make tender or payment of money, or other performance, according to such condition, as fully as the bankrupt might have done; and after such tender, payment, or performance, may sell and dispose of such real or personal estate for the benefit of the creditors."

Property passes to assignees, subject to lien, &c.

The property, therefore, so pledged, passes, on the bankruptcy of the pawnor, to his assignees, subject to any existing legal lien or claim the holders may have upon it; but if the goods be in the possession of a bailee, having a lien upon them, that lien must be satisfied before the goods are removed (2). The commissioners under the fiat in bankruptcy will, however, in general, allow the property so pledged, to be sold, in case of refusal by the assignees to redeem it, and will allow the creditor to prove for any balance that may be due to him (3), in the same manner as in the case of an equitable mortgage. And, if it be practicable to dispose of a pledge, a creditor has been allowed to resort to a sale, without application to the commissioners, so as if without fraud, not to destroy his right of proof for the balance of his claim (4).

Commissioners may consent to sale of pledge.

In absence of fraud, allowed to sell without application to commissioners.

Proof of debt without pre-

But if instead of applying to have the property sold,

(1) *South Sea Company* v. *Duncomb*, 2 Str. 919.
(2) 2 Eq. Ca. Abr. 98.
(3) *Ex parte Hillier*, Cooke, 146.
(4) *Ex parte Geller*, 2 Mad. 262.

the party thus having a lien upon it were to prove upon the estate of the bankrupt for the whole amount of his debt, the Lord Chancellor, upon petition, would order the property to be delivered up for the benefit of the creditors, or to be sold, and the proof to be reduced; and if the creditor, by reason of his having proved for the whole amount of his debt, have affected the interest or rights of others, such as by voting in the choice of assignees, signing the bankrupt's certificate, &c., he will not, in general, be allowed to retract his proof, but will be compelled to give up the property (1). If therefore he wish to prove upon the estate, for the purpose of voting in the choice of assignees, signing the certificate, &c., when unable to dispose of the matter in pledge, he ought to petition the court to have leave to take the security at a certain value, and to prove for the difference; and, in the absence of fraud, this permission will be granted (2).

vious application to sell, will be ordered to be reduced.

Party having pledge ought to petition, in such case, to take the security at a certain value.

Thus, where debts were secured by a deposit of hops, the court directed a value to be set upon them according to the market price, at the day of the choice of assignees, and permitted the creditors to prove for the difference between the price so fixed and the debts secured, and to vote in the choice of assignees (3).

The power of the court to order a valuation or a sale being discretionary, is exercised according to the particular circumstances of the case (4). Thus they have refused to order the sale of a bond pledged as security for a debt, and to permit the creditor to prove his whole debt under the fiat (5). Yet the application of a creditor

Power of the court to order sale discretionary.

(1) See Arch. B. L. 100; *ex parte Solomon*, 1 Glyn & J. 25.

(2) *Ex parte Nunn*, 1 Rose, 322; *ex parte Hopley*, 1 Jac. & W. 423; and see *ex parte Barclay*, 1 Glyn & J. 272; *ex parte Greenwood*, Buck. 327.

(3) *Ex parte Greenwood*, Buck. 323.

(4) *Ex parte Smith*, 1 Ves. & B. 518; 2 Rose, 63.

(5) *Ex parte Smith & Strickland*, 2 Glyn & J. 105.

holding property of the bankrupt, the title to which was disputed, to take it at a fixed value, and prove for the difference, and vote in the choice of assignees, has been allowed (1).

Party holding pledge by two bankrupts, may prove balance on separate estates, if no joint property.

A creditor, holding a pledge, the joint property of two bankrupts, may notwithstanding prove the remainder of his debt under the separate estates of the bankrupts, if there be no joint property (2); or he may prove against the separate estate of one debtor, and recover what he can against the other (3).

Or the separate security of one on joint estate, without giving it up.

So the holder of a separate security from one of two co-debtors, may prove against the joint estate, without surrender or sale of his security (4).

Pledge in which bankrupts and another are jointly interested. Proof allowed for balance only.

But if goods, in which the bankrupts are jointly interested with a third party, be pledged with a creditor, to secure the payment of an acceptance of the bankrupts, and part of the proceeds are received by the creditor before application to prove, he must deduct the amount so received, before he will be allowed to prove on the acceptance (5). It would, however, be otherwise were the goods the property of the third party alone.

Contra, if pledge the property of third party alone.

When creditor has two debts, may apply a general pledge to a non-proveable debt.

Where a creditor has two debts due to him by a bankrupt, one of which is proveable, the other not, and he holds a security, which has not been made specifically applicable to either of the debts, he may apply it to the debt which is not proveable, and prove the other upon the bankrupt's estate (6).

Bill of exchange given to creditor, with-

Where a debtor gives a bill of exchange to his creditor, without endorsing it, and becomes bankrupt, the

(1) *Ex parte Barclay*, 1 Glyn & J. 272.
(2) *Ex parte Geller*, 2 Mad. 262.
(3) *Ex parte Bennett*, 2 Atk. 258; *ex parte Parr*, 1 Rose, 76.
(4) *Ex parte Havard*, Cooke, 147.
(5) *Ex parte Prescott*, 4 Deac. & Chit. 23.
(6) *Ex parte Havard*, Cooke, 147; *ex parte Arkley*, *id.* 149; *ex parte Hunter*, 6 Ves. 94.

bill, in such case, is deemed either a pledge or a purchase, according to the intent of the parties at the time; if a pledge, the assignees may insist on its being sold, before the creditor is allowed to prove his debt; if a purchase, it liquidates the debt to the full amount of the bill (1).

Bill without endorsement, may be either a pledge or purchase.

Though the term "pledge," in its common acceptation, would, of itself, infer the delivery of manual possession to the pawnee, it may not be improper to remark, that if the goods or articles, the subject of the pledge, be allowed to remain in the hands of the pawnor, and the latter meanwhile becomes bankrupt, they will pass to his assignees, as being in his possession, order, or disposition, as reputed owner (2).

Pledge must not be in the hands of bankrupt.

And it may be observed, that the same rules and law, which have been explained in reference to the validity of a lien on the property of a bankrupt, are applicable to a common pledge. That, to render the pledge binding against the assignees of a bankrupt, it must have been given prior to the issuing of the fiat, and before the pawnee had notice of any act of bankruptcy; without any fraudulent preference by the bankrupt, and unattended by circumstances evincing a want of caution and prudential inquiry on the part of the pawnee (3).

Requisites to the validity of pawn by a bankrupt.

(1) *Ex parte Smith*, Cooke, 147; *Troughton, ibid.*; *Gardner, ibid.*: and see *ex parte De Tastet*, 1 Ves. & B. 280; *ex parte Martell*, 1 Rose, 325.

(2) See Geo. 4, c. 16, s. 72; but see *ante*, p. 61, where the bankrupt has only a special use of the pledge.

(3) See 2 & 3 Vic. c. 29.

CHAPTER IV.

ASSIGNEES OF DEBTS AND GOODS, IN THE HANDS OF AGENTS, &c.

Equitable lien of an assignee of debt or goods in the hands of an agent.

HAVING traced the nature of Lien, its character and requisites, as recognised in the courts of common law, I shall proceed, in the next place, to the consideration of other species of lien, of peculiarly equitable character, which, in their operation and beneficial effect in the transactions of business, are of scarcely less moment or practical consequence than those already defined. Of these species are—the recognised lien of vendors of estates till payment of the purchase money—the lien of judgments, crown debts, *lites pendentes*, &c., on landed property—the lien created on estates by a naked deposit of title-deeds—implied lien in cases of trust—the lien of an assignee of a debt, in the hands of a debtor—the lien of a party to whom has been given a draft or order for the delivery of money or goods in the hands of a third party, holding as agent—and lastly, the lien of the remitter or consignor against the agent.

Each of these divisions of the subject will be explained in distinct and successive chapters, devoted to their consideration. The lien intended for immediate inquiry and discussion in this place, is confined to the instances lastly enumerated, as affecting money or goods in the hands of an agent or third party.

In attempting to define the lien of an assignee of money or goods thus held by another, I may perhaps afford a clearer comprehension of the subject, by taking a cursory glance at the power of an assignee, under like circumstances, by *action at common law*.

A chose in action is not assignable, so as to enable the assignee to prosecute, in his own name, a suit at law against the debtor, but he may use the name of the assignor for that purpose (1). *At law*, chose in action not assignable,

It is true, such an arrangement may be made between the several parties as to amount to an entire change and transfer of their mutual debts; and, to this extent, the courts have engrafted an exception upon the general rule, and effected the intention of the contracting parties, by viewing the original debts as extinguished, and new obligations created; thus recognising the power of an assignee of a debt to sue in his own name (2). For instance, where there has been a defined and ascertained debt due from A. to B., and a debt to the same, or a larger amount, due from C. to A., and the three have agreed that C. shall be B.'s debtor instead of A., and C. has promised to pay B.; the latter has been allowed to maintain an action against C. on showing that, at the time when C. promised to pay B., there was an ascertained debt due from A. to B. Except by arrangement of parties.

So, where a person, not a general agent, had money sent to him to pay a third party, and acknowledged it, an action of *assumpsit* was held to lie for money had and received (3). In however recognising, to this extent, the right of an assignee, the consent of the debtor or person holding the money has always been held indispensable, before an action could be commenced against him for the recovery of it. There must exist a connexion or privity between the debtor or the party in possession of the funds, and the claimant of the money, for a mere direction from the original creditor to the debtor to pay the debt, or the Money sent to pay over to another. Requisite privity to entitle an action for recovery.

(1) *Pickford* v. *Ewington*, 4 Dow. P. C. 453.

(2) *Fairlie* v. *Denton*, 8 B. & C. 395; 2 M. & R. 353, *S. C.*; *Curon* v. *Chadley*, 3 B. & C. 591; 5 D. & R. 417, *S. C.*; *Wharton* v. *Walker*, 4 B. & C. 163; 6 D. & R. 288, *S. C.*; *Crowfoot* v. *Gurney*, 9 Bing. 372.

(3) *Lilly* v. *Hays*, 2 Har. & Wol. 338.; 5 Ad. & Ell. 548; 1 Nev. & P. 26, *S. C*

remittance of a sum by one to an agent, to hand over to another, would in general be an insufficient foundation for an action of *assumpsit*. But such sufficient privity may arise by implied consent of the party holding the money or goods; and thus it has been held, that where money has been put into the hands of a party for a given purpose, which purpose is for the benefit of a third person, unless he expressly repudiate the commission, he becomes a trustee for the third party, so as to enable him to sue for money had and received (1).

Implied consent of party holding money, &c., to pay same.

Until such assent, however, a power of repudiation remains in the party from whom the order emanates. "It is entire to the remitter," observed Lord Ellenborough (in an action against some bankers to recover the amount of bills transmitted by their foreign correspondents, with directions to pay the proceeds to the plaintiff), "to give and countermand his own directions respecting the bills, as often as he pleases, and the persons to whom the bills are remitted may still hold the same for the use of the remitter himself, until by some engagement entered into by themselves with the person who is the object of the remittance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person" (2).

Until consent, remitter may repudiate order to pay over, &c.

An authority given by a person to his debtor to pay the debt to a third party, the creditor of the former, is irrevocable after the debtor has given a pledge to such third party that he will pay the money according to the authority (3). So, a principal cannot, even as against his agent,

Authority to pay, when revocable.

(1) *Robertson* v. *Lubbock*, 4 Sim. 175; *Gates* v. *Bell*, 5 B. & Al. 645; *Baron* v. *Husband*, 4 B. & Ad. 614; 1 Nev. & M. 728, *S. C.*; *Fitzgerald* v. *Stewart*, 2 Sim. 340.

(2) *Williams* v. *Everett*, 14 East, 582; and see *De Bernales* v. *Fuller*, *ib.* 590.

(3) *Hodgson* v. *Anderson*, 3 B. & C. 842; 5 D. & R. 735, *S. C.*; *Frühling* v. *Schröder*, 7 C. & P. 103; *Crowfoot* v. *Gurney*, 9 Bing. 372; *Gibson* v. *Minet*, R. & M. 71; *Wedlake* v. *Hurley*, 1 C. & J. 83.

rescind the order, if a third person be induced to make advances on the faith thereof, and the money be, in fact, appropriated and set apart by the terms of the order, as a security to the third party (1).

Appropriation of goods, &c. ordered to be delivered to a third party.

Of the nature of, and what amounts to, an appropriation, it will be necessary to speak more fully in considering the validity of the claim of lien on goods sent under similar circumstances. Sufficient, it is conceived, has been advanced on the subject of an assignee's rights at common law, to enable us to consider now his right in the nature of lien, or charge on specific debts or goods transferred to him, or consigned with specific directions in his favour.

Assignee of debt.

1st. As to the lien in favour of the assignee of a debt on money in the hands of a debtor.

Doctrine of courts of equity.

The courts of equity have constantly recognized the relation of debtor and creditor, as constituting that privity which is held to be the requisite ground-work and basis of lien (2). They have exceeded, in an essential point, the latitude of the courts of law. In the latter, it has been shown, the consent of the debtor is requisite to enable the assignee to commence an action for, and to recover, the amount assigned; and the policy of this regulation rests on the multiplicity of suits to which the debtor might be otherwise subjected under a relaxation of the rule. The courts of equity, on the other hand, in cases of mere pecuniary debt, have not required that the debtor shall have assented to the assignment. They deem the debtor, on notice of the assignment, bound in conscience to satisfy the creditor's claim, whether demanded by himself, or by another in his behalf; and hold an assignment of such claim to vest

Debtor need not have assented to arrangement.

(1) *Robertson* v. *Fauntleroy*, 8 Moore, 10; *Fisher* v. *Miller*, 1 Bing. 150; *Hare* v. *Richards*, 5 M. & P. 35.

(2) *Smith* v. *Everett*, 4 Bro. C. C. 64; *ex parte* South, 3 Swan, 393; *Heath* v. *Hall*, 2 Rose, 271.

in the assignee a binding and available lien on the debt assigned (1).

On executor of a debtor of assignee.

A draft given by a person to a creditor, before his bankruptcy, on the executor of a debtor of the bankrupt, which the executor promised to discharge on receiving assets, has been held to amount to a good equitable assignment of the debt, available against the assignees of the bankrupt (2).

On a fund in hands of third party.

But, if the object and charge of the authority be a fund of money, such fund must not only be specifically pointed out and defined, but the party holding it must be expressly directed to pay it over. A mere intimation to another in possession of the fund, that the *cestui que trust* is a debtor to a third party, is not sufficient to entitle a creditor to a specific lien upon it (3).

On money, goods, &c., in the hands of an agent.

2nd. As to the lien of a party, in whose favour directions have been given to an agent or consignee, to retain money or goods, or the proceeds of goods.

In permitting the exercise of powers affecting the interests of, or charging third parties, in respect of money or goods in their hands, as mere agents or holders on behalf of the assignor, and not as debtors, the courts of equity have not enforced the like obligation to deliver them up, on assignment to a third party, without previous appropriation of the property charged, or an express assent by both parties to the arrangement. In this instance, therefore, the rules of law and equity are alike; in the one case, no action being maintainable, and in the other, no right of lien accruing, till such appropriation or assent has taken place.

Three requisites to establish lien.

To establish a lien on money or goods, under these circumstances, there are three concurrent requisites.

1. A specific direction from the owners or consignors,

(1) *Row* v. *Dawson*, 1 Ves. 332; *Adams* v. *Claxton*, 6 Ves. 229; *Lett* v. *Morris*, 4 Sim. 610.

(2) *Ex parte* Alderson, 1 Mad. 53.

(3) *Watson* v. *Duke of Wellington*, 1 Russ. & M. 602.

to the holders or consignees, to apply the money, goods or produce to the party claiming the lien.

2. An acceptance of the commission on the part of the consignees or holders.

And lastly, the assent of the party for whose benefit the appropriation is intended.

A mere naked mandate from a principal to his agent gives to a third person no right or interest in the subject of the mandate. It may be revoked at any time before it is executed, or, at least, before any engagement is entered into with such person to execute it for his benefit, and such revocation may even be inferred by any subsequent disposition of the property inconsistent with the execution of the order.

A mandate to deliver goods to a third party, inoperative without appropriation.

The following is an instance of a similar case. Messrs. Harrington and Co., of Madras, had made a consignment of two boxes of pearls to Messrs. Burnie, of London, with directions to sell them, and pay the proceeds to the defendants, Messrs. Porcher and Co., on account of a debt due from H. and Co. Burnie and Co. acknowledged the receipt of the consignment, and undertook to follow these directions, but no notice was given by either party to Porcher and Co. Subsequently, H. and Co. wrote to Burnie and Co., requesting the pearls to be sent to America, and there disposed of; and afterwards becoming insolvent, made an assignment of their whole effects to assignees, for the benefit of their creditors. Before, however, the goods were exported to America, Porcher and Co., having heard of H. and Co.'s insolvency, attached the goods, sold them, and applied the produce in discharge of their claim.

A bill in equity was consequently filed by the assignees of H. and Co., praying an account against the defendants, and that they might be decreed to refund the proceeds of the sale. To this the defendants, by their answer, contended, that even admitting that they had obtained pos-

session of the pearls by reason of the attachment and judgment, they had a right to retain the produce, and apply it in discharge of their debt, by reason of the consignment to that effect, of which they only received notice subsequently to the seizure under the judgment; but it was held, that the directions accompanying the assignment did not constitute an appropriation of the goods, but amounted to a mere naked authority, revocable at pleasure, and that the subsequent order, respecting the disposition of the property, amounted to such revocation (1).

This case affords a strong illustration of the insufficiency of contracts of this character, unless perfected by the concurrent privities already pointed out. The direction of the owners to apply the produce in favour of the third party had been obtained—the commission accepted on the part of the consignees—and the only requisite wanting was the assent of the party for whose benefit the appropriation was intended. In two instances the required privity was accomplished, both in respect of the parties, and the subject-matter of the order, but no privity existed between the holder of the property and the party entitled to the appropriation, and hence only the lien failed.

In concluding the remarks upon this branch of the subject, it may be observed, that the absence of privity alluded to, will not occur in cases where the position and character of the parties is mutually known to each other prior to the delivery to, or during possession of, the goods by the agent. This may be illustrated by the following case:—

Let it be supposed, that instead of a mere order given by A. to B. to hold certain property for C., which, of itself, would create no lien in favour of C. against B., the

(1) *Scott* v. *Porcher*, 3 Mer. 652; and see *ex parte* Haywood, 2 Rose, 355; *Williams* v. *Everett*, 14 East, 582; *Wilkins* v. *Savage*, 2 B. & B. 459.

actual right to the property has passed, on good consideration, from A. to C. A subsequent delivery to B. would then undoubtedly alter the case; and, not less so, where having previously obtained possession, he continues to hold the property after knowledge of the arrangement, for a privity is thereby established between B. and C., and C. has a lien upon the property in B.'s hands, and may institute a suit against him, if he refuse to surrender it (1).

Right of consignor to money unapplied, &c. in hands of agent.

3rd. As to the lien of a consignor on money unapplied by an agent, or goods consigned to him for some special unexecuted object.

This portion of the subject will be found to have been discussed at length under its more appropriate head of "Factors, Brokers, and Agents." The present reference to it is intended only as a brief exemplification of another kind of privity deemed requisite in the establishment of a lien of this nature, viz. privity of property, as contradistinguished from privity of person.

We have already seen that privity of parties is fundamentally essential to the recognition of the lien lastly discussed; and we come next to the consideration of another acknowledged right of lien, arising out of the consignment of goods, or the remittance of funds into the hands of another, for a specific purpose, where the latter becomes bankrupt previously to their destined application, or the fulfilment of the trust, upon which they have been consigned.

Identity of property.

The rights of the consignor or remitter, in such case, are dependent on the fact of identity, or in other words, on the establishment of privity in respect of the property consigned. If that identity be proved by clear and satisfactory testimony, the lien arises. Money, it is true, will not readily admit of this power of identity: mixed with other funds, it becomes the common stock of the bank-

(1) See this subject discussed in Law Mag. vol. 15, p. 60.

rupt, and the essential attribute of this kind of lien, viz. identity, is hence impossible. But the funds may have been so applied in specific purchase, as to afford sufficient proof that property in the bankrupt's possession is the identical object of the purchase; so goods may have been sold, and the produce of the sale so set apart for the consignor, or received in bills or in some other especial mode of payment, as to afford an equally available means of identifying the proceeds. Hence, if a factor has sold goods and received the proceeds before bankruptcy, in notes capable of identity, or has exchanged the goods for other goods which can be distinguished as the object of the exchange, the notes or goods are subject to the claim or lien of the principal for whom the sale or exchange has been effected, and will not pass to the assignees (1).

And where A. abroad, commissioned B. in London, to send him foreign coin, with particular directions as to the manner and times of sending it, and remitted bills which B. discounted; the coin required not being obtainable in England, B. sent two remittances, not equal to the amount of A.'s bills, to Lisbon, for the purpose of procuring it, with directions, if it could not be had, to return bills. The coin not being to be had, bills nearly to the amount of the remittance to Lisbon, not indorsed by the correspondent there, were returned, and, B. in the interval having become bankrupt, were received by the assignees. A. was held under the circumstances to have a lien upon the bills, but the Lord Chancellor expressed a doubt whether the lien would hold in the case of a remittance to buy goods in the way of trade (2).

And if a principal has ordered his correspondents to use the proceeds of bills sent to them, or of goods consigned, in making particular specified payments, those

(1) *Taylor* v. *Plumer*, 3 M. & S. 562; *Whitecomb* v. *Jacob*, 1 Salk. 160; *Scott* v. *Surman*, Willes, 400; *Paul* v. *Birch*, 2 Atk. 622.

(2) *Ex parte Sayers*, 5 Ves. J. 168.

proceeds will be considered as so appropriated, and the lien of the principal will exist to that extent (1).

Identity of property changed, traced through various hands.

An instance of the identity of particular property on which a lien was sought to be established, occurred in the celebrated case of *Small* v. *Attwood* (2). A decree having been made, setting aside a contract on the ground of wilful misrepresentation, a supplemental bill was filed to obtain possession of certain stock which, it was alleged, had been purchased with the money paid in completion of the contract. The cheques in payment of the purchase had been presented at the banking-house of Pole and Co., and at the Bank of England. Certain bank notes, marked and numbered, were there delivered in exchange. These were paid into Hammersley's and Co., and precisely the same bank notes were delivered over by Mr. Attwood to his agents, in order that they might purchase stock with them; the notes were then delivered by the stockbrokers to their bankers, Dorrien and Co., and on the same day that the money was so delivered, the stock in dispute was purchased. The court therefore held that the stock had been purchased with the identical funds paid in completion of the purchase.

Property, in its original state and form, covered with a trust in favour of another, cannot, it thus seems, by any change of that state and form, be divested of such trust, so as to afford any more valid claim in parties than existed before the change; for an abuse of trust can confer no rights on the person abusing it, nor on those claiming in privity with him. It makes no difference in reason or law into what other form, different from the original, the change may have been made, for the product of, or substitute for, the original thing, still follows the nature of the thing itself, as long as it can be ascertained to be such, and the right only ceases when the

(1) *Ex parte Ourssell*, Amb. 1.
(2) Younge, 535.

means of ascertainment fail, which is the case when the subject is turned into money, and mixed with and confounded in a general mass of the same description. The difficulty which arises in such case is a difficulty of fact, and not of law, and the *dictum* that money cannot be followed, because it has no ear-mark, must be understood in the same way; *i. e.* as predicated only of an undivided and undistinguishable mass of current money (1).

CHAPTER V.

LIEN IN EQUITY.

VENDORS AND PURCHASERS OF REAL AND LEASEHOLD ESTATES.

Lien on title-deeds for amount of purchase money.

In ordinary cases, where the conveyance expresses, contrary to the fact, that the purchase money is paid, though the estate, in the absence of fraud, passes by the deed *at law* (2), it does not *in equity*, until actual payment of the consideration for which, it seems, by such conveyance, the vendor has contracted to part with his estate. For, unless there appear a manifest intention to the contrary, a vendor retains a lien on the estate till the whole of the purchase money is paid (3), whether the

(1) Vide judgment in *Taylor* v. *Plumer*, 3 M. & S. 562; per Lord Ellenborough, C. J.; and *Miller* v. *Race*, 1 Burr. 457.

(2) *Rowntree* v. *Jacob*, 2 Taunt. 141; *Henderson* v. *Wild*, 2 Camp. 561; *Lampon* v. *Corke*, 5 B. & Ald. 606; *S. C. nom. Lambourne* v. *Cork*, 1 D. & R. 211.

(3) *Mackreth* v. *Symmons*, 15 Ves. J. 329; *Selby* v. *Selby*, 4 Russ. 336; and see *Burgess* v. *Wheate*, 1 Bl. 123; *Coppin* v. *Coppin*, 2 P. Wms. 291; *Ryle* v. *Haggie*, 1 Jac. & W. 234; *Chapman* v. *Tanner*, 1 Vern. 267.

estate be copyhold or freehold (1), and whether actually conveyed or otherwise (2).

Principle upon which right of lien permitted.

The principle upon which the courts of equity have proceeded in establishing this lien, in the nature of a trust, is, that a person having gotten the estate of another, ought not, in conscience as between them, to be allowed to keep it, and not to pay the consideration money. A third person, upon like principle, having full knowledge that the estate has been so obtained, ought not to be permitted to keep it without making such payment, for it attaches equally to him as a matter of conscience and duty. It would otherwise happen that the vendee might put another person into a predicament better than his own, with full knowledge of the facts (3).

If security be taken for purchase money, court will look at the intention of the parties.

If security has been taken for payment, instead of actual payment of the purchase money, the court will look to the substantial dealing of the parties, and inquire whether the security so taken was intended to be an absolute discharge of the purchase money, or not. Thus where part of the purchase money for an estate was, in pursuance of an agreement for the purchase, secured by the bond of the purchaser, payable at the death of the vendor, or other event, with stated interest, and the conveyance expressed it to have been actually paid, and had the vendor's receipt endorsed upon it to that effect, it was held that the vendor had no lien on the estate for the amount of the bond (4). When, however, this question was subsequently brought before the Lord Chancellor, on appeal, his Lordship considered, that as there was nothing in the agreement for the extinguishment of the lien, nor in the transaction itself, as evidenced

(1) *Winter* v. *Lord Anson*, 1 S. & S. 434; 3 Russ. 488.

(2) See cases *supra*, and *Pollexfen* v. *Moore*, 3 Atk. 274; *Charles* v. *Andrews*, 9 Mod. 152.

(3) 2 Stor. on Eq. p. 465.

(4) *Winter* v. *Lord Anson*, 1 S. & S. 434; *Clarke* v. *Royle*, 3 Sim. 499.

by the instruments, leading to a clear and manifest inference that such was the intention of the parties, the vendor had a lien upon the estate in question for the residue of the purchase money, and therefore reversed the decree of the court below (1).

Annuity taken *in lieu* of purchase money.

This point was again brought before the court, and fully discussed in a case where a vendor, *in lieu* of the price of £3000, agreed to accept an annuity of £100, for the joint lives of her intended husband and herself, in case the purchaser should so long live; the purchaser engaging that his personal representatives should, within three months after his decease, in certain events, pay a further sum of £3000; and the judgment of the V. C. in *Winter* v. *Lord Anson*, was again acted upon (2). The conveyance in this case, it is true, evinced more clearly than in the former, the real nature of the transaction, and evidenced, more strongly, the intention of the parties to make the annuity the substituted consideration for the purchase. From both cases, however, the like distinction may be deduced, under which the existence or non-existence of the vendor's lien may be ascertained, viz., whether the bond or other security so given be a mere collateral security for the purchase money stated in the conveyance, and not relied upon as payment; or an actual substitution or independent security for the price, precluding the claim of lien.

Nature of the contract, and intention of the parties, must be considered.

The true nature of the contract must first therefore be clearly ascertained; for, as observed by Lord Commissioner Shadwell (3), the proper way of dealing with questions of this kind is to look at the instruments executed

(1) *Winter* v. *Lord Anson* (on appeal), 3 Russ. 488; an appeal was lodged in the House of Lords against this decision of the Lord Chancellor, but was afterwards withdrawn.

(2) *Parrott* v. *Sweetland*, 3 Mylne & K. 655; and see *Macbreth* v. *Symmons*, 15 Ves. J. 329; *Tardiffe* v. *Scrughan*, 1 Bro. C. C. 420.

(3) *Parrott* v. *Sweetland*, *supra*.

by the parties at the time; and, upon them, to declare what the meaning of the parties must have been. The decision, therefore, in the case last mentioned, as observed by his Lordship, is in strict conformity with the principle laid down by Lord Lyndhurst in *Winter* v. *Lord Anson* (although under the special circumstances of the case, his Lordship came to an opposite conclusion as to the fact), and that acknowledged principle is not affected by the decision, though apparently conflicting. The circumstances of the one case negatived the presumption that the annuity was a mere security for the purchase money; while, on the contrary, the other manifested an equally apparent intention between the parties, that the bond should be retained as a security merely. The price therefore was unpaid, and the lien remained.

What will prevent lien.

If the vendor take security for part of the purchase money, by the vendee's bond, and a mortgage of part of the property sold, he cannot, on the bankruptcy of the vendee, establish a lien on the entire estate (1). So, if he take the covenant of the purchaser that the purchase money shall be repaid within two years after a resale (2), or, if he accept stock for the purchase money, with an agreement, that in case it does not, within a certain period, produce a sum named, the purchaser shall make up the sum (3), or, if he take a mortgage of another estate for the purchase-money; the obvious intention of burthening one estate being, that the other shall remain free and unincumbered (4); it has been held, that the vendor's lien is discharged.

Covenant for repayment of purchase money.

Accepting stock in payment of purchase money,

Or mortgage of another estate.

But such mortgage not conclusive divestment of lien.

It has, however, been observed by Lord Eldon, that notwithstanding a mortgage, it was not a violent conclusion, that, as between vendor and vendee, the lien should

(1) *Capper* v. *Spottiswoode*, 1 Tam. 21; *Blackburne* v. *Gregson*, 1 Cox, 90.
(2) *Ex parte Parkes*, 1 Glyn & J. 228.
(3) *Nairn* v. *Prowse*, 6 Ves. J. 752.
(4) *Ibid.*; *Bond* v. *Kent*, 2 Vern. 281.

continue to exist. It must not, he observed, be understood, that a mortgage taken is to be considered as a conclusive ground for the inference that a lien was not intended, as he could put many instances, that the mortgage of another estate for the purchase money, would not be decisive evidence of an intention to give up the lien, though in the ordinary case, a man has always greater security for his money upon a mortgage, than value for his money upon a purchase; and the question must be, whether, under the circumstances of a particular case, attending to the worth of a mortgage, the inference arises. In the instance of a pledge of stock, does it necessarily follow that the vendor, consulting the convenience of the purchaser, by permitting him to have the chance of the benefit, therefore gives up the lien which he has? The doctrine as to taking a mortgage or pledge, would be carried too far, if it is understood as applicable to all cases, that a man taking one pledge, therefore necessarily gives up another. This must be laid down upon the circumstances of each case, rather than universally (1).

Assent of vendor to a mortgage to a third party precludes his lien.

But if a purchaser borrows part of the purchase money, and pays it to the vendor, leaving the residue unpaid, and the conveyance is made to him stating the transaction, and giving thereunder security to the lender, the concurrence of the vendor will preclude him from any claim to lien for the remainder of the purchase-money; if not against the purchaser, certainly against the mortgagee (2).

Where conveyance is to trustees.

A purchase-deed made to several trustees, by a vendor, having knowledge of the character in which they purchase, and expressing the consideration money to have been paid, negatives any right to lien for part of the

(1) *Mackreth* v. *Symmons*, 15 Ves. J. 348; and see *Cowell* v. *Simpson*, 16 Ves. J. 278.

(2) *Cood* v. *Pollard*, 9 Price, 544; 10 Price, 109; *nom. Cood* v. *Cood*.

purchase money, allowed to remain in the hands of one of the trustees, without the concurrence of the others (1).

Taking bills, &c. in payment of purchase money, does not discharge lien.

A vendor's lien is not discharged by his taking or negotiating bills of exchange or notes, on the sale of real property, for this does not amount to any relinquishment of his claim upon the land (2), even though the vendee becomes bankrupt (3). And it may be considered as now clearly settled that a bond, bill, note, or covenant, is, generally speaking, no discharge of the vendor's equitable lien (4), though a contrary decision has been maintained in one instance, where the transaction was deemed distinct and independent of the purchase (5).

In a late case, estates were devised to trustees, who were also executors, in trust to sell, and pay the proceeds to children in equal shares, and the children agreed that one of the trustees should have the estates, in consideration of a certain sum, and took, as security for part of the purchase money, which was not paid, two promissory notes of the purchaser, payable by instalments, and (as to the shares of two of the children) an assignment of a policy of insurance. The notes were never paid, and the purchaser becoming bankrupt, it was held that the unpaid purchase money continued to be a lien on the estates (6).

Where no receipt for purchase money endorsed.

The absence of the customary endorsement of a receipt on the deed of conveyance, though not essential or necessary *at law*, as proof of payment of the purchase money, where, on the face of the deed, it is expressed to

(1) *White* v. *Wakefield*, 7 Sim. 401.

(2) *Ex parte Loaring*, 2 Rose, 79; *Grant* v. *Mills*, 2 Ves. & B. 306; *Saunders* v. *Leslie*, 2 Ball & B. 514.

(3) *Ex parte Peake*, 1 Madd. 346.

(4) *Gibbons* v. *Baddall*, 2 Eq. Ca. Ab. 682, n. (6) to D.; *Hearle* v. *Botelers*, Cary's Rep. Chan. 25; *Blackburne* v. *Gregson*, 1 Cox, 90; *Nairn* v. *Prowse*, 6 Ves. J. 752.

(5) *Fawell* v. *Heelis*, Amb. 724; 1 Bro. C. C. 421, n.

(6) *Ex parte Latey*, 2 Mon. & A. 609.

have been paid, is, *in equity*, constructive notice of lien, for the amount of the purchase consideration, and sufficient to put the purchaser upon the inquiry, and to entitle him to proof of payment by the vendor (1).

Lien of seller continuing on estate as lessee.

Where a lessee was entitled to a lien as the seller of an estate, and continued in possession, with the knowledge of the purchaser; such fact has been held not to bind the latter by constructive notice of the lien, where the vendor has acknowledged the receipt of the purchase money in the conveyance; for that would prevent the necessity of further inquiry (2).

Lien for expenses, loss, &c., on re-sale under conditions, on non-completion of purchase.

It is commonly stipulated as a condition on the sale of an estate, that if the purchaser neglect or fail to complete the purchase within a limited time, the estate shall be put up for re-sale, and the expenses of such second sale, and the loss, if any, shall be defrayed by the original purchaser.

Where not completed by purchaser's default, and he afterwards becomes bankrupt.

If a purchaser, after breaking such condition of sale, becomes bankrupt, and the estate is re-sold at a loss, the expenses of the sale, &c., being in the nature of unliquidated damages, cannot be proved under the commission or fiat; but as the vendor has a lien on the estate, he may apply the money produced by the last sale of the estate: first, in payment of those articles which it is just he should receive, but which he could not prove under the bankruptcy; then towards payment of the original purchase money; and the balance may be proved under the fiat. Or the court will, in some instances, at once sell the estate, and pay the purchase money to the vendor (3).

Delivery of conveyance to

A purchaser having delivered a conveyance to a ven-

(1) *Rowntree* v. *Jacob*, 2 Taunt. 141; *Bidlake* v. *Arundel*, 1 Cha. Rep. 93.

(2) *White* v. *Wakefield*, 7 Sim. 401.

(3) Sug. Vendors, vol. 1, p. 66, 10th ed.; *ex parte Hunter*, 6 Ves. J. 94; *Bowles* v. *Rogers*, *ibid.* 95, n., 1 Cooke, 123; *Hope* v. *Booth*, 1 B. & Ad. 498; *ex parte Lord Seaforth*, 1 Rose, 306; *ex parte Glyde*, 1 Glyn. & J. 323.

dor, in order to obtain the execution of it, thus enables him to detain it, when executed, till the purchase money is either paid or tendered; for the execution of the deed, coupled with possession of it, would otherwise vest the estate in the purchaser, and enable him to recover it (1).

vendor, for execution, gives him thereupon lien for purchase money.

The rights of vendors, in respect of their lien for the unpaid purchase money, pertain, in some cases, to purchasers also. Thus, if a vendor of premises cannot perfect a title thereto, and the purchase money has been prematurely paid, the purchaser, upon like principles of equity, has a lien for it on the estate in the hands of the vendor, even though he may have taken a specific security for the money so paid (2). So, the lien of a vendor upon the land and title-deeds, until the purchase money be paid him, does not apply to a conveyance to the purchaser, executed by some but not by all the parties, where the contract has gone off by the vendor's default; for if there be any lien on such conveyance, it is vested in the purchaser, as security for his deposit (3).

Where conveyance not completed by vendor's default, purchaser has lien for money paid:

But although the vendor has fraudulently concealed an incumbrance, yet the purchaser has no lien on the purchase money, after it is appropriated by the vendor.

But not if vendor has fraudulently concealed incumbrances:

Thus, in the case of *Cator* v. *Earl of Pembroke* (4); Lord Bolingbroke was tenant for life of a settled estate, with a power to sell and lay out the money arising by sale in other lands; and in the mean time to invest the same in the funds. Lord Bolingbroke granted life annuities out of the estate; and then he and the trustees under the settlement, sold the estate to Cator, who was ignorant of the annuities, and Lord Bolingbroke covenanted that Cator should enjoy, free from incumbrances.

(1) *Esdaile* v. *Oxenham*, 3 B. & C. 225; 5 D. & R. 49 *S. C.*; *Oxenham* v. *Esdaile*, 2 You. & Jerv. 493; 3 You. & J. 262.

(2) *Lacon* v. *Mertins*, 3 Atk. 1.

(3) *Oxenham* v. *Esdaile*, 2 You. & Jerv. 493; 3 You. & Jerv. 262.

(4) 1 Bro. C. C. 301; and see 12 Ves. J. 356, 377.

The purchase money was invested in the funds, in the name of the trustees; and Lord Bolingbroke granted annuities to Boldero, the banker, to the extent of the dividends; and the trustees, at the request of Lord Bolingbroke, gave Boldero an irrevocable power of attorney to receive the dividends. Cator, being evicted by the grantee of the annuities charged on the estate, filed his bill, insisting that he had a lien on the purchase money invested in the funds, and was entitled to the dividends, in exclusion of Boldero. The cause was first heard before the Lords Commissioners Loughborough, Ashurst, and Hotham, who thought that Cator had a lien on the dividends, but that Boldero had a preferable equity, and therefore dismissed the bill. The cause was reheard before Lord Thurlow (1), who affirmed the decree; and was moreover of opinion, "that Cator could not follow the money when deposited with the trustees, but that, having taken a covenant for quiet enjoyment and a good title, his remedy was that way."

Nor if contract were originally illegal.

Nor does lien attach in favour of a purchaser, if the purchase be not completed in consequence of the illegality of the contract; for that would enable him to derive the benefit of his illegal contract (2).

Transfer of lien only operates to extent of transferror's interest.

The vendor having acquired a lien, cannot transfer a greater interest in the deeds than he himself possesses. Thus where, upon the sale of leasehold premises, the purchaser accepted bills for the purchase money, and the original lease, and the assignment executed by the vendor, were deposited with a third person, as a collateral security, to be delivered up to the purchaser on payment of the bills, and the vendor, after some of the bills were paid, got possession of the lease from the depositary, and pledged it with persons who, *bonâ fide*, advanced money upon it, and to whom he endorsed the outstanding bills;

(1) 2 Bro. C. C. 282.

(2) *Ewing* v. *Osbaldeston*, 2 Mylne & Cr. 88.

it was held, that the pawnees had no lien on the lease, beyond the amount of these bills (1).

But though equity raises this lien in favour of a vendor, it was formerly held not to extend to third persons; that is, where the vendor was satisfied out of the personal estate of the purchaser, in exclusion of a third person, that person could not resort to the equitable lien of the vendor on the estate; or, in other words, could not require the purchased estate and the personal estate to be marshalled (2).

The right has been held not to extend to third persons.

But it has been since determined, that where a testator has agreed for the purchase of estates, and died, leaving the greater part of the purchase money unpaid, the assets of the purchaser are, on the ground of the vendor's lien, subject to be marshalled on behalf of a legatee against the heir to whom the estate has descended (3). In this decision the Vice Chancellor expressly relies on the weight of the authority of the cases previously decided; and observes that it is abundantly in favour of holding, that the lien of the vendor must be subjected to the ordinary rule of marshalling assets.

But assets of a deceased purchaser may now be marshalled on behalf of a legatee.

Sir Edward Sugden, in the recent edition of his valuable Treatise on the Law of Vendors and Purchasers of Estates, has preserved an argument, which he had ad-

Sir Edward Sugden's view of this doctrine.

(1) *Hooper* v. *Ramsbottom*, 4 Camp. 121; *Harrington* v. *Price*, 3 B. & Ad. 170.

(2) Sugd. Vend. vol. 3, p. 205, 10th edit.; *Coppin* v. *Coppin*, Sel. Cha. Ca. 2 P. Wms. 291; and *Pollexfen* v. *Moore*, 2 Atk. 272, which, Sir Ed. Sugden observes, agrees with the former case in establishing this rule, but deviates from it, in the particular instance, on the ground of fraud. And it establishes this important distinction: that where the purchaser has an equitable mortgage on the estate, or in case of fraud, the purchased estate and the personal estate may be marshalled in favour of simple contract creditors and legatees.

(3) *Sproule* v. *Prior*, 8 Sim. 189, overruling *Coppin* v. *Coppin*, 2 P. Wms. 291; *Wythe* v. *Henniker*, 2 M. & K. 635; and see Sir Edward Sugden's comments on the last case, Vend. & Pur. vol. 3, p. 210, 10th ed.; *Austen* v. *Halsey*, 6 Ves. J. 475.

vanced in a former one with considerable justice, against the extension of the vendor's lien in such case, on the ground that it would be breaking in on the statute of frauds. "The general rule," he observes, "as to marshalling, applies to cases where the person resorting to the personal estate has an actual charge or lien on the real estate; but in this case, if equity first deems the purchaser a trustee for the vendor, as to so much of the estate as will satisfy the purchase money unpaid, and then permits a disappointed legatee to stand in the place of the vendor, it is creating a charge on the land in direct opposition to the statute of frauds (1). And this cannot justly be compared to a lien created in equity by deposit of deeds, because that is an act done which, like the case of partial performance, takes a case in equity out of the statute. On sale of the estate, the purchase money becomes a debt payable out of the purchaser's personal estate; and the equitable estate, it is conceived, ought to be extended to so much only of the purchased estate, as the personal estate is insufficient to answer. The vendor has not an original charge on the estate, but only an equity to resort to it, in case the personal estate prove deficient. In this view of the case, an independent substantive charge on the land is, in fact, created by equity in favour of a legatee, although if the legacy was actually imposed on the estate by a will, not duly executed according to the statute of frauds, the court is bound to say, that the will cannot be read as to the charge."

Mr. Coote's opinion.

Mr. Coote (2), in his "Treatise on Mortgages," offers as an answer to this objection, that the inroad on the statute of frauds would not, in fact, be greater in such case than in the case of equitable lien by possession of title deeds; for, in fact, in the latter case, the mortgage

(1) See now 1 Vict. c. 26.
(2) Coote on Mortg. p. 257.

is raised on the presumption of equity, and then the legatee is let in to stand in the mortgagee's place. The cases, he continues, are nearly parallel, or at all events are equally within the mischief intended to be prevented by the statute of frauds.

It has been already shown, however, that assets are now considered as liable to be marshalled on behalf of pecuniary legatees against an heir acquiring the estate by descent, and that they are entitled to stand in the place of the seller upon the descended estate, so far as he has been satisfied out of the personal effects (1). But this liability is confined strictly to the case of descent, and does not extend to that of specific devise (2). In the instance of simple contract creditors this distinction does not exist, and the assets are equally subject to be marshalled, whether the estate be in the hands of a devisee, or of the heir by descent (3).

Against purchaser and his heir, &c.

This equitable lien exists against the purchaser and his heir, and all persons claiming under him with notice of it, even for valuable consideration (4), though not against a *bonâ fide* purchaser, without notice; and a mere deduction of the title to the estate from the first vendor, by recital, will not be sufficient to affect him, for it does not show that the consideration money was not paid (5).

(1) *Sproule* v. *Prior*, 8 Sim. 189.

(2) *Wythe* v. *Henniker*, 2 Myl. & K. 635; *Trimmer* v. *Bayne*, 9 Ves. J. 209.

(3) *Selby* v. *Selby*, 4 Russ. 336; and see *Headley* v. *Roadhead*, Coop. 50, as to rateable contribution by legatees and annuitants, where testator directed executors to pay purchase money of a purchased estate, and the assets were insufficient for all purposes; and *Trimmer* v. *Bayne*, 9 Ves. J. 209.

(4) *Hearle* v. *Botelor*, Cary's Cha. Rep. 25; *Walker* v. *Preswick*, 2 Ves. Senr. 622; *Gibbons* v. *Baddall*, 2 Eq. Ca. Abr. 682, n. (*b*) to D.; *Elliot* v. *Edwards*, 3 Bos. & Pull. 181; *Mackreth* v. *Symmons*, 15 Ves. J. 329.

(5) 1 Bro. C. C. 302; but see *Davies* v. *Thomas*, 2 You. & Col. 234.

Against assignees or creditors of purchaser.

So the assignees of a purchaser, being bankrupt (1), or creditors claiming under a conveyance from him (2), are bound in like manner.

Against the Crown.

A deposit of title-deeds by a simple contract debtor of the crown, for securing part of the purchase money for another estate, binds the crown as an equitable mortgagee, although the purchaser also give his bond to the vendor for the money (3).

Against one having equal equity.

Between equal equities the rule is "*qui potior est tempore, potior est jure*," and therefore a subsequent incumbrancer, who has not obtained the legal estate, cannot postpone the vendor's lien (4).

CHAPTER VI.

JUDGMENTS.

Judgments a lien on land.

It would be altogether futile, in the limited compass of a treatise of this nature, to attempt any minute definition of the lien of judgments on land in the hands of a purchaser. Their operation as a charge is, however, of such constant recurrence, and so affected by recent enactments, that an omission of some statement and explanation of their general effect, might seem inconsistent with a work professing to treat generally on the subject of lien. I purpose, therefore, to confine myself, as closely as possible, to a view of the former as contrasted with the

(1) *Blackburne* v. *Gregson*, 1 Bro. C. C. 420; *Bowles* v. *Rogers*, 6 Ves. J. 95 n. (*a*); *ex parte Hanson*, 12 Ves. J. 346; and see *Mitford* v. *Mitford*, 9 Ves. J. 100.

(2) *Fawell* v. *Heelis*, Amb. 724; 1 Bro. C. C. 302.

(3) *Casberd* v. *Ward*, 6 Price, 411; *Fector* v. *Philpott*, 12 Price, 197.

(4) *Ex parte Wright*, 3 Mon. & A. 49; but see *Stanhope* v. *Earl Verney*, Butl. Co. Litt. 290, *b*. n. (1) xv.

existing law on this subject; to define the distinctive effects of judgments on estates of freehold and leasehold tenure, as formerly recognized; the necessity that existed, and still exists, for search and inquiry on the part of a purchaser, before execution of the conveyance; and the modes adopted in order to fortify titles to property, and to overreach incumbrances of this description.

More properly speaking, judgments are statutary liens, rather than liens in equity. The remedies of creditors in respect of them are derived under act of Parliament, and it is only when some legal impediment subsists, that they have resort to a court of equity to enforce the rights vested in them by law (1).

Effect of judgments, duly entered up, under the old law.

Against freeholds.

The effect of a judgment (under the st. West. 2. c. 18, or 13 Ed. 1, st. 1, c. 18), for debt or damages, in any of the courts of law at Westminster, whether given in an adverse action, or entered upon the rolls by the party's consent, without any previous process (unless of mere formality), was to bind his present and future real property (2), as a statute merchant; except that only one-half of the land, &c. (to be set out by the sheriff, according to the valuation made by a jury summoned by him for that purpose), could ultimately become the subject of the estate by *elegit*. And if there was such an estate subsisting, only one-half of the remaining moiety of the lands could, in general, be taken under a second writ of *elegit* (3); though the question between the two creditors, which should be entitled to the entire moiety, would depend on the priority of their respective judgments (4). If the judgments were both of the same

In general only one-half of land seizable under *elegit*.

Formerly judgments were dated the first

(1) *Tunstall* v. *Trappes*, 3 Sim. 286; *Neate* v. *Duke of Marlborough*, 3 Myl. & Cr. 407; *Weymouth* v. *Boyer*, 1 Ves. J. 416.

(2) *Stonehewer* v. *Thompson*, 2 Atk. 411; *Brace* v. *Marlborough*, 2 P. Wms. 492; *Stileman* v. *Ashdown*, 2 Atk. 609.

(3) *Huyt* v. *Cogan*, Cro. Eliz. 482; *Burnham* v. *Pain*, 2 Brownl. 97.

(4) Bur. Com. of Real Property, 4th ed. 299; Com. Dig. Exec. c. 14.

day of the term in which signed.

term, this was incapable of decision, for then, by a fiction of law, the date of both was referred to the first day of that term, and thus the whole land might have been taken upon two *elegits* (1).

29 Car. 2, c. 3.

By the 29 Car. 2, c. 3, ss. 14, 15, the difficulties arising under this fiction of law were in some measure removed, and it was thereby enacted, that the day of signing any judgment should be entered on the *margent* of the roll of the record; and that such judgments, as against purchasers *bonâ fide*, for valuable consideration, should relate to that time only. But, though considerably obviated, the difficulty might still occur, for if there were two writs tested on the same day, and the defendant was at the time in possession of the whole of his lands, the sheriff was bound to take a moiety under each writ, and there was no difference in the case, whether the two writs were at the suit of the same or of separate parties, provided they were so tested at the same time, and had relation to the same day (2).

Recent rule of court.

By a recent general rule of the courts (3), all judgments, whether interlocutory or final, are now entered of record of the day of the month and year, whether in term or vacation, when signed, and have not relation to any other day.

Against leaseholds available from delivery of execution.

Under the old law judgments did not bind leasehold property till execution had been taken out upon them and delivered to the sheriff. By stat. 29 Car. 2, c. 3, s. 16, "No writ of *fieri facias*, or other writ of execution, shall bind the goods of the party against whom such writ of execution is sued forth, but from the time that such writ shall be delivered to the sheriff, under-sheriff, or coro-

(1) *Doe d. Davies* v. *Creed*, 5 Bing. 327. The language of the writ is "*quod vicecomes fieri faciat de terris et catallis, vel quod liberet omnia catalla, exceptis bobus et aſris caruca, et medietatem terræ quousque debitum fuerit levatum per rationabile pretium et extentum.*"

(2) *Ibid*; *Attorney-General* v. *Andrew*, Hardr. 23.

(3) *Regulæ generales*, Hil. T. 4 W. 4.

ners, to be executed." Leaseholds being chattel interests, were therefore within the protection of this clause, and a sale of them was good after judgment, but not after execution issued (1).

Copyholds not liable to *elegit*, except for debt due to the king.

Upon feodal principles, that the connection between lord and tenant shall not be destroyed, copyhold lands have, till a recent period, been exempted from liability to be taken in execution upon a judgment. But, in case of a debt to the king, as appears by *magna charta*, c. 8, it was allowed by the common law for him to take possession of the lands till the debt was paid; for he being the grand superior, and ultimate proprietor of all landed estates, might seize the lands into his own hands, if anything was owing from the vassal; and could not be said to be defrauded of his services, when the ouster of the vassal proceeded from his own command (2).

Property of bankrupts formerly protected.

The property of bankrupts was also, until recently, so far protected as to afford creditors by judgment, not having obtained execution, and made an actual seizure, no advantage over the other creditors (3).

Estates in hands of mortgagees.

So estates in the hands of a mortgagee were not liable to judgments of which he had no notice, entered up between the execution of the mortgage, and a subsequent purchase of the equity of redemption (4).

Trust estates.

Trust estates were, in some cases, held liable where execution had been issued prior to the conveyance to a purchaser, but not where a trustee had previously conveyed away the lands (5), nor where the trust was not a clear

(1) Sir Gerard Fleetwood's case, 8 Co. 171; and see 1 Fitz. Abr. tit. "Execution," pl. 108; *Shirley* v. *Watts*, 3 Atk. 200.

(2) 3 Blac. Com. 419; 1 Roll. Abr. 888.

(3) 21 Jac. 1, c. 19, s. 9; 6 Geo. 4, c. 16, s. 108; *Taylor* v. *Taylor*, 5 B. & C. 392; 8 D. & R. 159, *S. C.*; but see *Orlebar* v. *Fletcher*, 1 P. Wms. 739, as to the effect of previous sale by bankrupt; and *Sloper* v. *Fish*, 2 Ves. & B. 145.

(4) *Lyster* v. *Dolland*, 1 Ves. J. 431; 3 Bro. C. C. 478.

(5) *Hunt* v. *Coles*, Com. 226; *Harris* v. *Pugh*, 4 Bing. 335.

and simple trust for the benefit of the debtor (1). Thus, where estates had been conveyed to trustees for the specific purpose of sale and distribution of the proceeds to two parties variously interested in the ownership, with power to give receipts for the purchase money, it was held, that a purchaser was not liable to judgments subsequently entered up against one of such owners; because it was the very essence of the trust, which the other owner had a right to have performed, that the trustees should convey the legal estate, and give receipts for the purchase money (2).

Equity of redemption in a term.

An equity of redemption in a term purchased was not an interest extendible under the statute of frauds, and therefore a purchaser was not affected by even an execution lodged, of which he had no notice (3).

The very silence of the statute of frauds, which, while it expressly introduces a new provision in respect to *lands and tenements* held in trust for the person against whom the execution is sued, says nothing as to trusts of chattel interests, affords a strong argument that those interests were meant to continue in the same situation and plight, in respect of executions, in which both freehold and leasehold trust interests equally stood, prior to the passing of that statute (4).

Equity of redemption in freeholds purchased by mortgagee.

A purchaser of an equity of redemption in freeholds, *without notice*, being already seized of the legal estate by way of mortgage, had no occasion to search for judgments, for he was within the rule applicable to persons who, acquiring the legal estate, take it discharged from

(1) *Doe* v. *Greenhill*, 4 B. & Ald. 684; *Harris* v. *Baker*, 4 Bing. 96.

(2) *Lodge* v. *Lysley*, 4 Sim. 70; *Foster* v. *Blackston*, 1 Myl. & K. 297.

(3) *Lyster* v. *Dolland*, 1 Ves. J. 431; *Burdon* v. *Kennedy*, 3 Atk. 739; *Shirley* v. *Watts*, 3 Atk. 200; *Scott* v. *Scholey*, 8 East, 467; *Metcalf* v. *Scholey*, 2 New Rep. 461; Fleetwood's case, 8 Co. 171.

(4) Per Lord Ellenborough, C. J. in *Scott* v. *Scholey*, 8 East, 486.

all equities of which they have no notice (1). Sir Edward Sugden, in his learned Treatise on the Law of Vendors and Purchasers (2), observes, that some gentlemen of eminence have even held, that notice of judgments entered up *subsequently to the mortgage*, would not affect the purchaser; but is himself of opinion, that if the purchase were made with notice, either expressed or implied, of any judgment, the legal estate would not protect him in equity against the judgment creditor. The judgment is a lien upon the estate in equity (3), and confers a right on the creditor to redeem a prior mortgage or other incumbrance (4). And, by the first principles of equity, a purchaser, with notice of any incumbrance, is bound by it in the same manner as the person was of whom he purchased (5). And, indeed, it has been expressly decided that a mortgagee, purchasing the equity of redemption, is bound by judgments of which he has notice, although they were entered up subsequently to the mortgage (6).

Against estate in joint tenancy.

The lien of a judgment has been said to be in expectancy during an estate in joint tenancy. If it be against a surviving joint tenant, then it attaches on the land in severalty in the usual course. If against the deceased joint tenant, and no execution is sued out in his life-time, then, as against the survivor, it is altogether nugatory (7).

Against like estate after alienation by one joint tenant.

But though judgments and crown debts against a deceased joint tenant might not affect the estate in the hands of the survivor, if a joint tenant aliened, so as to

(1) *Lyster* v. *Dolland*, 1 Ves. J. 431 ; 3 Bro. C. C. 437 ; and see *Burdon* v. *Kennedy*, 3 Atk. 739 ; *Scott* v. *Scholey*, 8 East, 467 ; *Metcalf* v. *Scholey*, 2 New Rep. 461 ; *Doe* v. *Evans*, 1 Cr. & Mee. 450.

(2) Vol. 2, p. 384, 10th edit.

(3) *Churchill* v. *Grove*, Nels. Cha. Rep. 89 ; 1 Cha. Ca. 35.

(4) See 2 Cha. Rep. 180.

(5) See Anon. 2 Ventr. 361, No. 2.

(6) *Greswold* v. *Marsham*, 2 Cha. Ca. 170 ; *Crisp* v. *Heath*, 7 Vin. Abr. 82 (E), pl. 2 ; *Tunstall* v. *Trappes*, 2 Sim. 286.

(7) Watk. Conv. 8th edit. 158 ; 6 Co. 78 ; Co. Lit. 184, *a*.

sever the jointure, or became the survivor or sole owner by release, prior judgments against him were held to be available charges on the property (1).

Modes of conveyance adopted to over-reach judgments.

Various expedients were at times adopted for the purpose of overreaching this liability to the judgments of the preceding owner; and a purchaser, without notice of any existing incumbrance, often invested himself with such title as to defeat the rights of the judgment creditor upon the lands purchased.

First, by acquiring outstanding legal estate.

Firstly, he might have fortified his possession by acquiring a legal outstanding interest. Such interest, in a freehold estate, if outstanding anterior to the docketting of the judgment, though acquired subsequently, without notice of the incumbrance, was held to be a sufficient protection to purchasers. They therefore not unfrequently clothed themselves with ample indemnity by getting in a legal outstanding term, and thus carried back their title to the possession for a much longer period than they could show a clear title to the inheritance. By this means they became legally entitled, during its continuance, to the possession of the estate, to the exclusion of all persons claiming any right to, or interest in, the land, in respect of any disposition or charge made subsequently to the creation of the term 2).

Second, by the exercise of a power of appointment.

A second mode of almost universal application with conveyancers was, to limit the estate to such uses as the purchaser should appoint, and in default of appointment to him for life, with remainder to a trustee, during the life of the purchaser, with remainder to the purchaser in fee.

By the exercise of such power of appointment, the right of any intermediate judgment creditor was necessarily defeated, for it has been established, ever since the time of Lord Coke, that where a power is executed, the

(1) Litt. s. 286; 6 Co. 78, b.
(2) Watk. Conv. 8th ed. 50.

person taking under it takes under him who created the power, and not under him who executed it (1). The only exceptions are, when a person executing the power has granted a lease or any other interest, which he may do by virtue of his estate, for then he is not allowed to defeat his own act. But suffering a judgment is not within the exception, as an act done by the party, for it is considered as a proceeding *in invitum*, and therefore falls within the rule.

Thus, in 1822, an estate was conveyed to such uses as Thomas Baker should, by deed, &c. appoint, and in the mean time, to the use of himself for life, &c. In 1826 a judgment was obtained against him, and in 1827 he mortgaged this estate, and appointed to the use of J. A. Wigan, for five hundred years. After the execution of this deed, the judgment creditor issued an *elegit*; but it was held, that the lien upon the land was defeated by the execution of the power (2).

It became, therefore, a firmly established and inflexible rule that, inasmuch as the appointee came in paramount the appointor, and there was no privity between them, the execution of a power of appointment, under which the purchaser took essentially, and not merely by way of further assurance, would over-reach every incumbrance which had attached in the mean time *by act of law*, such as dower, which is a lien at common law, and judgments, which are a lien by statute.

Purchasers must not have notice of incumbrance when acquiring outstanding term.

But, as the adoption of the first-mentioned mode, viz., the getting in an outstanding term, depended, for its validity, on the absence of notice, constructive or actual, of the existence of judgments, it was essential to consider how far it might be advisable to search the books of registry.

(1) *Roach* v. *Wadham*, 6 East, 289; Sir Edward Clere's case, 6 Co. 18 *Ray* v. *Pung*, 5 B. & Al. 561; *Maundrell* v. *Maundrell*, 10 Ves. J. 255; *Moreton* v. *Lees*, cited 5 Mad. 318.

(2) *Doe d. Wigan* v. *Jones*, 10 B. & C. 459.

Docketting not, *per se*, notice against freeholds.

The mere docketting of judgments was not, as against freehold estates, notice, *per se*, of their existence (1). An assignment of an outstanding term might therefore have been taken, notwithstanding the entry of the judgment, and the search was, under such circumstances, avoided, for proof of it would have amounted to constructive notice of the incumbrance.

Against leaseholds.

As regarded leasehold estates, though the necessity for a search for judgments was not deemed equally necessary, it was yet considered safer and more advisable to make it, because the sheriff would not permit his office to be searched for any writ of execution which might have been delivered there, lest the purposes of the writ might have been defeated by the party against whom it was issued, absconding or removing his goods. Therefore, although the judgment itself would not bind the leasehold estate, the purchaser could not safely complete his contract, where he discovered a judgment, because he could not be satisfied that an execution issued upon it had not been lodged with the sheriff (2).

Relief in equity to purchaser, where judgment entered subsequent to payment of purchase money.

A purchaser might, under particular circumstances, have entitled himself to relief in equity, where the judgment was entered up subsequent to the payment of a *bonâ fide* consideration, though the conveyance had not been actually executed; for the judgment formed no specific lien on the land, and the vendor was deemed a mere trustee for the purchaser, whether the judgment creditor had notice of the contract or not (3).

Purchasing at reduced value, in consequence of judgment not docketted.

Although a judgment was not duly docketted, and therefore void against a purchaser, yet if he had notice of it, and did not pay the value of the estate, it was pre-

(1) *Snelling* v. *Squint*, 2 Cha. Ca. 47; *Churchill* v. *Grove*, 1 Cha. Ca. 37; *Greswold* v. *Marsham*, 2 Cha. Ca. 170.

(2) 2 Sugd. Vend. 593, 10th edit.

(3) *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 278; and see *Forth* v. *Duke of Norfolk*, 4 Mad. 503.

sumed that he agreed to pay off the judgment, and equity would compel him to perform such implied agreement (1).

Paying part of purchase money to a judgment creditor.

Where a purchaser paid part of the purchase money generally to a creditor of the vendor, by judgment, or upon other security affecting the land, and also by bond, or upon other security which did not affect the land, it was considered as a payment in satisfaction of the judgment, or other incumbrance which charged the estate (2).

Changes in the law.

The law, in respect of many of the exceptions enumerated, has recently however experienced a total change, and not only has the operation of judgments been extended against the estates of bankrupts, but against various descriptions of property which were before partially or wholly exempted from it.

Judgments now affect estates of every description.

By the first statute under which these changes have been effected (1 & 2 Vict. c. 110), not only freeholds but all other lands, tenements, rectories, tithes, and hereditaments, including those of copyhold and customary tenure, are made liable to be *wholly* delivered in execution, and judgments are binding against them, whether in possession at the time, or subsequently purchased; of whatever interest, legal or equitable, or whether in reversion or expectancy, and against the debtor in person, and all others, whether his issue, or those in any other manner claiming under him after such judgment, whom he might bar; and equity will relieve the creditor to the same extent as the debtor himself might, by charge of the judgment debt and interest on the hereditaments (3).

Without further recurring to the former law on this

(1) *Thomas* v. *Pledwell*, 7 Vin. Abr. 53, pl. 5; 2 Eq. Ca. Abr. 684; and see *Davis* v. *Earl of Strathmore*, 16 Ves. J. 419.

(2) *Brett* v. *Marsh*, 1 Vern. 468; see *Hayward* v. *Lomax*, 1 Vern. 24; *Peters* v. *Anderson*, 5 Taunt. 596.

(3) *Sed vide post*, 2 Vict. c. 11, s. 5, by which it is enacted that judgments, duly registered, shall not affect purchasers or mortgagees without notice, more extensively than before the passing of this Act.

subject, I shall proceed to point out the statutes under which purchasers and others are now bound.

Present effect of judgments on estates.

By the 1 & 2 Vict. c. 110, s. 11(1), which recites that the then existing law was defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and that it was expedient to give judgment creditors more effectual remedies *against the real and personal estate* of their debtors than they possessed thereunder; the sheriff or other person to whom any writ of *elegit*, or precept in pursuance of it, is directed, upon any judgment recovered in an action in the superior courts of Westminster (2), is now empowered to deliver execution of all the lands, tenements, rectories, tithes, rents and hereditaments, including those of copyhold or customary tenure, of which the person so sued, or any one in trust for him, shall have been seized or possessed at the time of entering up the judgment or afterwards, or over which he has any uncontrolled assenting power for his own benefit, in like manner as the sheriff may deliver execution of the moiety of the lands and tenements of any other person, against whom a writ of *elegit* is sued out. The act contains, however, a reservation in respect of copyhold or customary lands, as to the payments and services due to the respective lords of the manors, which are thenceforth directed to be paid and rendered by the person to whom the lands shall be delivered in execution.

Reservation of the rights of lords of manors, &c.

And of purchasers, &c. having become so before commencement of act.

And there is a proviso also, that as against purchasers, mortgagees, or creditors, who shall have become so before the commencement of the act, such writ of *elegit* shall not have greater effect than it would have had in case the act had not passed.

Sheriff empowered to

Sec. 12, enables sheriffs to seize, under writ of *fieri*

(1) The mode of execution of a warrant of attorney to confess judgment, &c., is specially defined, and the same declared invalid, unless executed accordingly.—Sections 9 and 10.

(2) By sec. 21, extended to the Courts of Lancaster and Durham.

facias, money, bank notes, checques, bills of exchange, promissory notes, bonds, specialties, or other securities for money, belonging to the debtor; and to pay over the money to the judgment creditor, and to sue in the sheriff's name for the money secured under any of the bonds, &c.

seize bank-notes, money, &c.

The 13th section of the act proceeds to render all existing and future judgments, entered up in the superior courts at Westminster(1), as well a charge upon the lands and hereditaments, which have been specified as leviable under the writ of *elegit*, and of which the person against whom it is entered up may be seized or possessed, for any estate or term at law or in equity, whether in possession, reversion, remainder, or expectancy, as binding against him personally, and against all other persons claiming under him after such judgment, and against the issue of his body and others whom he may debar, without assent, from any reversionary interest therein. And it further gives to every judgment creditor the same remedies in a court of equity against the hereditaments so charged, as he would be entitled to, if they were expressly charged with the amount of the judgment debt and interest upon it(2); but restricts him from proceeding in equity to obtain the benefit of such charge, until the expiration of one year from the time of entering up the judgment; or in the case of judgment entered up prior to the commencement of the act, until one year from that period.

Judgments binding against person, lands, and those claiming any interest under debtor.

Equitable remedies reserved.

No proceeding in equity, till one year after judgment.

No judgment creditor is, however, to have any preference in case of the bankruptcy of the person against whom judgment shall have been entered up, unless it shall have been so entered up one year, at least, before the bankruptcy.

Judgment must have been entered up one year before bankruptcy of debtor.

(1) By sec. 21, extended to Courts of Lancaster and Durham.

(2) Sec. 17, 1 & 2 Vict. c. 110, allows interest, at the rate of four per cent. per annum, from date of judgment, with power to levy for same under writ of execution on such judgment.

Not to affect purchasers before passing of the act, &c.

The act also provides that, as regards purchasers, mortgagees, or creditors, who became such before the time appointed for its commencement, the judgment shall not operate, otherwise than as it would have done if the act had not passed.

Nor prior equity of purchasers, without notice.

And, by another proviso, it is declared that nothing therein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers, for valuable consideration, without notice.

Stock and shares in public funds and companies belonging to the debtor, and standing in his own name, or in trust for him, to be charged by order of a judge.

The statute further enacts, that all government stock, funds, annuities, and shares in public companies, belonging to the person against whom any judgment shall have been entered up, whether standing in his own name or that of a trustee, shall, upon the order of any judge of one of the superior courts, stand charged with the payment of the amount recovered by such judgment, but permits no proceedings to be taken to obtain the benefit of such charge till six months from the date of the order. For the purpose, however, of preventing the creditor from transferring or disposing of his stock, shares, &c., meanwhile the judge is enabled to make an order to show cause, in the first instance, *ex parte*, without notice to the judgment debtor; and such order, when served upon the Governor and Company of the Bank of England, or upon any public company, or their authorized agent, is to operate as a restriction against the permission to transfer such stock or shares till the order be made absolute or discharged. And in case such transfer be permitted notwithstanding, the corporation or persons permitting it are to be liable to the judgment creditor for the amount of property transferred, or so much as may satisfy the judgment; and the disposition of the property is declared void against the creditor (1).

Order to be *ex parte*, and on notice to bank or company, to operate as a distringas.

Securities not realised, to be

All securities or charges obtained under the provisions

(1) Sections 14 and 15.

of the statute are to be relinquished, if the creditor, before realizing the same, shall cause the judgment debtor to be taken in execution (1). relinquished, if debtor be taken in execution.

Sec. 17, enacts, that every judgment debt shall carry interest, after the rate of 4*l.* per centum per annum, from the time of entering up the same; and that such interest may be levied under the writ of execution thereupon. Judgments to carry interest.

Sec. 18, enacts, that all decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor, or of the Court of Review, in matters of bankruptcy, and all orders of the Lord Chancellor, in matters of lunacy, whereby any sum of money, or any costs, charges or expenses shall be payable to any person, shall have the effect of judgments in the superior courts of common law; and the persons to whom the same shall be payable shall be deemed judgment creditors, and be entitled to similar remedies. And by the same section, the powers given to the judges of the superior courts of common law, to be exercised in such courts, are extended to the several courts of equity and bankruptcy. Persons entitled to costs, &c. under order of courts, deemed judgment creditors.

Sec. 19, enacts, that no judgment of any of the said superior courts, nor any decree or order in any court of equity, nor any rule of a court of common law, nor any order in bankruptcy or lunacy, shall, by virtue of the said act, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade or profession of the person, whose estate is intended to be affected thereby, and the court, and the title of the cause or matter, in which such judgment, decree, order or rule, shall have been obtained or made; and the date of such judgment, decree, order or rule, No judgment, decree, &c., to affect real estate, except as before, until registered.

(1) Section 16.

and the account of the debt, damages, costs, or monies, thereby recovered or ordered to be paid, shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same particulars in a book, in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, decree, order or rule; and such officer shall be entitled, for any such entry, to the sum of five shillings; and all persons shall be at liberty to search the same book, on payment of the sum of one shilling (1).

Judgments, duly entered up, are not confined in their operation to lands in the possession of the debtor at the time when they are signed, but extend to after-purchased estates; and though heretofore forming a general lien, now operate as an actual *specific charge* on the land (2).

4 & 5 W. & M. c. 20. Former statute regulating the mode of docketting.

The manner, the time, and other requisites of docketting or indexing the judgments, were, till lately, explained and limited by the st. 4 & 5 W. & M. c. 20 (perpetuated by the 7 & 8 W. 3, c. 36, s. 3); and similar provisions were contained in the various register acts, for particular places, for a purchaser's security, by making the judgment bind only from the time of registration.

Now regulated by 2 Vict. c. 11.

An act passed in the last session of Parliament (3), entitled, "An act for the better protection of purchasers against judgments, crown debts, *lis pendens*, and fiats in

(1) The statute contains a special provision for the counties of Lancaster and Durham.

(2) *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 278; *Prior* v. *Penprase*, 4 Price, 99.

Where any judgment existed, although it was only a general lien, yet a purchaser always required satisfaction upon it to be entered up on the roll. But now that a judgment is an actual specific charge on the land, the attorney of a vendor of land is bound to set forth a list of existing judgments in the abstract of title delivered to the purchaser, like every other charge upon the property. Sug. Vend. vol. 2, p. 381, 10th edit.

(3) 2 Vict. c. 11.

bankruptcy," has, however, repealed the provisions of the first-mentioned statute, and in lieu thereof enacted others for the future entry and docketting of judgments.

Repeal of st. 4 & 5 W. & M. c. 20, as to docketting of judgments.

By sec. 1, no judgment is hereafter to be docketted under that statute, but all such dockets are to be finally closed immediately after the passing thereof, without prejudice to the operation of any judgment then docketted and entered under the repealed act, except so far as any such judgment may be affected by the provisions therein contained.

As to judgments already docketted.

Sec. 2. That no judgment docketted and entered under the said act of their late Majesties King William and Queen Mary, shall, after the first day of August, one thousand eight hundred and forty-one, affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, unless and until such memorandum or minute thereof, as is prescribed in an act passed in the first and second years of her present Majesty Queen Victoria, intituled "An act for abolishing arrest on mesne process and civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England;" (1) shall be left with the senior master of the Court of Common Pleas at Westminster, who shall forthwith enter the same in manner thereby directed in regard to judgments; and such officer shall be entitled for any such entry to the sum of five shillings.

The date when

Sec. 3, enacts, that in addition to the entry by the said

(1) 1 & 2 Vict. c. 110, s. 19. "A memorandnm or minute, containing the name, and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court, and the title of the cause or matter in which the judgment, &c. shall have been obtained or made, and the date of such judgment, &c., and the account of the debt, damages, costs, or monies, thereby recovered or ordered to be paid."

the memorandum of judgment is left to be entered in a book.

last-mentioned act, or by the said act, required to be made in a book by the senior master, of the particulars to be contained in every memorandum or minute left with him of any judgment, decree or order, rule or order, he shall insert in such book the year and the day of the month when every such memorandum or minute is so left with him.

Judgments after five years from entry, void, unless a fresh memorandum is left within five years before right of purchase accrued.

Sec. 4, enacts, that all judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy or lunacy, which, since the passing of the said recited act of the first and second years of the reign of her present Majesty, have been registered under the provisions therein contained, or which shall thereafter be so registered, shall, after the expiration of five years from the date of the entry thereof, be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors, unless a like memorandum or minute, as was required in the first instance, is again left with the senior master of the said Court of Common Pleas, within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument, vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors, within five years before the right of such creditors accrued, and so, *toties quoties*, at the expiration of every succeeding five years; and the senior master shall forthwith re-enter the same in like manner as the same was originally entered; and such officer shall be entitled, for any such re-entry, to the sum of one shilling.

Judgments duly registered not to affect purchasers or mortgagees more extensively than

Sec. 5, provides, *That as against purchasers and mortgagees without notice of any such judgment, decrees or orders, rules or orders as aforesaid, none of such judgments, decrees or orders, rules or orders, shall bind or affect any lands, tenements, or hereditaments, or any interest therein, further,*

or otherwise, or more extensively, in any respect, although duly registered, than a judgment of one of the superior courts aforesaid would have bound such purchaser or mortgagee before the said act of the first and second years of the reign of her present Majesty, where it had been duly docketted according to the law then in force.

judgments of superior courts would have done before the 1 & 2 Vict. c. 110.

Sec. 6, provides, that nothing in the said recited act of her present Majesty, nor in the present act contained, shall extend to revive or restore any judgment which shall be extinguished or barred, nor shall the same extend to affect, or prejudice any judgment as between the parties thereto, or their representatives, or those deriving as volunteers under them.

Not to revive judgments extinguished or barred.

Execution, under judgments registered in the mode required, may be levied upon all lands and tenements, of which others are seized, in trust for, *and for the benefit* of the party against whom the execution is sued, as if the party himself were seized of the like estate, at the time the execution was sued out (1); and the whole estate, under the present law, is liable to an execution (where heretofore only a moiety could have been levied (2), save in the case of purchasers and mortgagees without notice (3).

Execution may be levied on all estates held in trust for debtor's benefit.

The modes formerly adopted, to prevent the operation of judgments upon estates in the hands of purchasers, are necessarily narrowed, but not rendered nugatory by the present law. If the stat. 1 & 2 Vict. c. 110 had remained unaltered by any subsequent statute, the effect might have been to have rendered either the getting in of an outstanding term, or the exercise of a power of appointment altogether invalid *in equity* for the purpose

Mode of avoiding judgments under the present law.

(1) *Harris* v. *Booker*, 4 Bing. 96; and see *Doe d. Hull* v. *Greenhill*, 4 B. & Ald. 684; *Harris* v. *Pugh*, 4 Bing. 335.

(2) 1 & 2 Vict. c. 110, s. 9.

(3) 2 Vict. c. 11, s. 5.

of overreaching the lien of judgments. A power of appointment, it has been observed, in a recent work (1), might have been executed by the debtor jointly with, or with the consent of another person, without falling within the 11th section of that statute; and an appointment under such power, created before the day of the judgment, would have defeated the creditor's execution *at law*, because the appointment would have overreached the equitable estate (liable at law) as well as the legal estate. But such appointment would not have been available *in equity*, for the 13th section gives to a judgment creditor the same remedies in equity, which he would have in case of an actual equitable charge by the debtor, and protects the creditor, claiming the benefit of a statutary charge, from an appointment under a joint power, except in the case within the proviso in that section, of a purchaser without notice.

2 Vict. c. 11, repeals the 1 & 2 Vict. c. 110, as to purchasers and mortgagees without notice.

The stat. 2 Vict. c. 11, has however introduced the most important alterations in the provisions of the 1 & 2 Vict. c. 110, and left the law, as it affects purchasers and mortgagees without notice, in precisely the same position in which it stood prior to the passing of that act, except as regards the manner and time of registering or docketting the judgments. It can scarcely be conceived that such was the intended operation of the statute; but since its effect has been to revive the former law, it follows that former modes may again be resorted to, in order to avoid the effect of judgments. The observations which I have before made, in reference to the exercise of antecedently created powers of appointment, and to the getting in of outstanding legal estates, are therefore as applicable under the present law as heretofore, but effectual resort can only be had to either re-

(1) Jarman's Prec. Conv. vol. 5, p. 49, 3rd edit.; *Skeeles* v. *Shearley*, 3 Myl. & C. 112.

medy, in case the purchaser or mortgagee be unaffected with notice of any existing judgment.

Limitation of proceedings under judgment.

By the 3 & 4 W. 4, c. 27, s. 40, "for the limitation of actions and suits relating to real property, and for simplifying the remedies for trying the rights thereto," it is enacted "That no money secured by mortgage, judgment, lien, or otherwise, charged upon or payable out of any land or rent, or any legacy, shall be recoverable by action or suit, but within twenty years after the right to receive the same shall have first accrued, unless in the meantime some part of the principal money and interest thereon shall have been paid, or there shall have been some acknowledgment of the right given by the person by whom the same is payable, in writing.

CHAPTER VII.

SPECIALTY CROWN DEBTS.

LIEN ON LAND.

Obligations and specialties to the king.

The statute 33 Hen. 8, c. 39, renders all obligations and specialties to the king, of the same force and effect as writings obligatory, made according to the statute of the staple (1).

(1) Statutum de stapulis, 27 Edw. 3, st. 2, c. 9. After enacting in what manner execution shall be made of a recognizance, acknowledged in the staple, the statute proceeds thus: "*Et en cas que les dettours ne soient trovez deinz lestaple, ne lour biens a la value de la dette, soit ceo certifie en chauncellerie south le dit seale; sur quel certification soit brief maunde, de prendre lez corps dez ditez dettours saunz lez mettre a meinprise, et de seisir lour terres et tenementz, bienz et chateux, et soit la dit bref retourne in nostre chauncellerie ove la certification de la value dez ditez terres et tenementz bienz et chateux, et sur ceo y soit due execution fait de jour en jour, en la manere come il est contenuz en lestatut marchaunt; issint que celui a*

Lands of a deceased crown debtor liable to recognizances, &c.

It also renders all manors, lands, tenements and hereditaments, in the seizin of any person to whom the same shall have descended in fee simple or fee tail, general or special, as heir, or by gift of any ancestor indebted to the king by judgment, recognizance, obligation or specialty, chargeable with the payment of the same debt. But, by a clause of contribution, it is enacted, "that if the lands, &c., so chargeable, shall happen to be in the seizin and possession of divers persons, other than the obligor or obligors, all and singular the said lands, &c., and every parcel of them, shall be wholly and entirely, and in nowise severally, charged and chargeable with the same debt.

Penalty given to crown equivalent to debt.

A penalty given to the crown by a statute, is equivalent to a common debt, and equally binding under the provisions of this statute (1).

Lands of officers of the crown liable to arrears of accounts.

By another statute, 13 Eliz. c. 4, all lands, tenements, profits, commodities, and hereditaments, which any of the treasurers, receivers (2), tellers, customers, collectors, farmers, officers, and accountants there enumerated, shall possess within the time whilst he shall remain accountable,

qi le dette est due eit estat de franke tenement en lez terres et tenementz que luy serrount liveres per vertue de cel proces, et recoverer per lettre de novel dissesine en cas qil soit ouste, et que le dettour neit my avauntage del quarter dun an, que est contenuz en le dit estatut marchaunt. Et en cas que nul creditour ne voille aver lettres de dite seal, eins voille estre a la foie le dettour, si apres la terme encoru il demaunde le dette, soit le dettour cru sur sa foy." Both the statute staple and the statute merchant, 11 Edw. 1, amended by the 13 Edw. 1, st. 3, are recorded acknowledgments of a debt, which not being paid by a certain day, the sheriff is authorized to deliver the lands as well as goods of the debtor to the creditor, by a reasonable extent, to hold them until such time as the debt is wholly levied, 2 Bac. Abr. 698; and the proceedings are, in effect, similar to those under the writ of *elegit*, but authorize the whole of the lands to be extended, and not a moiety, as was formerly the invariable case under the latter writ.

(1) *Grove* v. *Aldridge*, 9 Bing. 428.

(2) 6 Geo. 4, c. 105, s. 13, repeals this statute as to receivers of customs. 12 Eliz. c. 7, includes within it, under collectors of tenths, and subsidies of the clergy.

shall be liable to, and be put and had in execution for, the payment of his arrearages, in like manner as if, when he first became such officer or accountant, he had stood bound by writing obligatory, having the effect of a statute staple for the payment of the same.

This statute is, however, confined to those officers whose annual income exceeds the sum of £300.

Who are officers within the statute.

It has been considered, that the lands of *every person* who has received money belonging to the crown, or for which he is responsible to it, are liable to an extent, within the provisions of the statute (1). But this rule has been too widely laid down, and many cases are to be found in which a more restricted and reasonable construction has been adopted.

Lien exists on all estates vested in any officer during his accountability.

A lien is created upon the whole of the real estate vested in the debtor, or of which he is seized, at any time during the period of his accountability, and though the land be *bonâ fide* alienated to a purchaser, for a valuable consideration, it yet continues subject to prerogative process for security and payment of any debt or balance that may be ultimately owing from him (2). Nor is it otherwise, though the debt due to the king has been contracted many years subsequently to the alienation (3); for all lands, being held mediately or immediately of the crown, are considered as bound for the payment of such debts, just as if there had been a reservation to that effect on the original grant (4), and the lien attaches immediately upon the acceptance of office, and before any debt is contracted (5).

Though alienated before debt accrued.

(1) *Wilde* v. *Forte*, 4 Taunt. 334; *Rex* v. *Fernandez*, 12 Price, 862; and *Rex* v. *Rawlings*, *ibid.* 834, as to deputy assistant commissary general. But see *Casberd* v. *Ward*, 6 Price, 411; *Rex* v. *Smith*, Wightw. 34; *Fector* v. *Phillpot*, 12 Price, 197.

(2) *Rex* v. *Rawlings*, 12 Price, 834.

(3) 10 Co. 55, 56.

(4) Bac. Abr. Tit. Execution (*k*).

(5) *Nicholls* v. *How*, 2 Vern. 389.

Sale of estates under letters patent.

Powers are given under the stat. of Eliz. for the sale of an accountant's lands by letters patent, after *scire facias* issued, whether standing in the debtor's own name, or in the name of another in trust for him.

Sale of estates returned upon inquisition.

The 25 Geo. 3, c. 35, points out, however, more particularly, the mode of selling the lands, tenements, and hereditaments of crown debtors returned upon inquisition, and authorizes the Court of Exchequer, on the application of his Majesty's Attorney-General, in a summary way, by motion to the same court, to order that the estate and interest of any debtor, or the heirs and assigns of such debtor, in any lands, tenements, or hereditaments, extended under any writ of extent, or so much as may be necessary to satisfy the debt, shall be sold in such manner as the court shall direct. His Majesty's remembrancer in the said Court of Exchequer, or his deputy, is then, under the directions of the court, to convey the premises sold, by a deed of bargain and sale enrolled in the court; and the conveyance thus effected is declared to be binding against the extent of the crown, and against the debtor, and his sureties, and all persons claiming under them, unless by title paramount to, and available in law against, such extent.

The application is not required to be made by the Attorney-General in person (1), but if the sale be effected without any application whatever, the court will decline to confirm it, or to direct the remembrancer to execute a conveyance (2).

Additional regulations respecting sale; and discharge of purchaser from debts due to the crown.

The 1 and 2 Geo. 4, c. 121, s. 10, contains additional regulations in reference to the sale of estates belonging to a public accountant, effected under a writ of extent, or any decree, or order of the Courts of Chancery or Exchequer. It is thereby enacted, "that where

(1) *Rex* v. *Bulkeley*, 1 Y. & J. 256.

(2) *Rex* v. *Blunt*, 2 Y. & J. 120; *et vid. Rex* v. *Boyd*; and *Rex* v. *Adam*, *ibid.* 122 (*n.*)

the purchaser or purchasers thereof, or of any part thereof, shall have paid his, her, or their purchase money into the receipt of his Majesty's Exchequer, an entry of such payment shall be made by the commissioners for auditing the public accounts, in the declared account of such public accountant; and from and after such payment and entry as aforesaid, such purchaser or purchasers, his, her, and their heirs and assigns, shall be wholly exonerated and discharged from all further claims of his Majesty, his heirs or successors, for or in respect of any debt arising upon such declared account, although his, her, or their purchase money shall not be sufficient in amount to discharge the whole of the said debt."

Debtors or accountants to the crown may, on payment of required sum, obtain certificate from commissioners of treasury that lands may be held by purchaser discharged from all claims.

A yet more recent statute, the 2 Vict. c. 11, has simplified the mode of obtaining the discharge of the lands of crown debtors, by enabling the commissioners of her Majesty's Treasury to impose the payment of a sum of money, by way of fine, in liquidation of existing debts, and upon payment accordingly, to certify that the lands are exonerated from further charge.

Sec. 10 recites, "that whereas it is expedient to make further provision for the discharge of an estate belonging to a debtor or accountant to the crown, from the claim of the crown, in the hands of a purchaser or mortgagee, although the debt or liability shall not be fully discharged;" and enacts, "that it shall be lawful for the commissioners of her Majesty's Treasury of the United Kingdom of Great Britain and Ireland for the time being, or any three of them, by writing under their hands, upon payment of such sums of money as they may think fit to require into the receipt of her Majesty's Exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the crown, or upon such other terms as they may think proper, to certify that any lands, tenements, or hereditaments of any such crown debtor or accountant shall be held by the purchaser or mortgagee,

or intended purchaser or mortgagee thereof, his or their heirs, executors, administrators, and assigns, wholly exonerated and discharged from all further claims of her Majesty, her heirs or successors, for or in respect of any debt, claim, or liability, present or future, of the debtor or accountant to whom such lands, tenements, or hereditaments belonged, or, in cases of leases for fines, to certify that the lessees, their heirs, executors, administrators, and assigns, shall hold so exonerated and discharged, without prejudice to the rights and remedies of the crown against the reversion of the lands, tenements, or hereditaments comprised in any such leases, and the rents and covenants reserved and contained by and in the same; and thereupon the same lands, tenements, or hereditaments shall respectively be held accordingly wholly exonerated and discharged as aforesaid, but in the cases of leases without prejudice as aforesaid."

Such discharge of part of the estate of a debtor or accountant to the crown not to affect claim of the crown on other lands liable.

Sec. 11, provides, "that any such certificate, or the discharge of any such lands, tenements, or other hereditaments, by virtue of the said act, shall in nowise impeach lessen, or affect the right or power of her Majesty, her heirs or successors, to levy the whole of any debt or demand which may at any time be due from any such debtor or accountant to the crown out of, or from any other lands, tenements, or hereditaments which would have been liable thereto in case no such certificate had been granted and no such discharge had been obtained."

Outstanding term no protection against crown debts on conveyance for valuable consideration:

The observations which have been offered in an earlier page (1), in reference to the general power of guarding against incumbrances affecting the inheritance of an estate, by obtaining the assignment of an outstanding term, created antecedently to the attachment of such incumbrances, are not, it seems, applicable to the case of crown debts. As before remarked, an interest in a term

(1) *Vide ante*, p. 106.

thus obtained has been considered a sufficient protection to purchasers in every instance where they have not had notice of existing judgments, and thus they have not unfrequently overreached charges incurred anterior to the conveyance. So far as between subject and subject, the law is satisfactorily established; but as between the crown and a subject, it has been held that an outstanding term cannot defeat the king's process by extent (1). The whole interest in the land is extendible, whether divided or not, and an outstanding term, held in trust for the vendor, is analogous to uses and trusts, which are undoubtedly liable to be seized for the king's debt (2).

Sir Edward Sugden, in commenting upon this important decision, observes "that this point had been previously considered by most of the leading characters of the profession, some of whom have since filled the highest judicial situations; and the general opinion of the profession seems to have been, that a purchaser might protect himself against crown debts by a legal term of years created previously to the right of the crown attaching on the estates, where he had not notice, express or implied, of the debt due to the crown, or of the vendor being an accountant to the crown."

The effect of such decision must necessarily be injurious to the interests of the country, for "any decision," continues the distinguished author to whom I have just referred, "which tends to clog the free alienation of property, and to render the titles of fair purchasers insecure, cannot but be productive of the most serious consequences, and well demands the interference of the legislature, *if the law is too well settled to be overruled*" (3).

(1) *Rex* v. *Smith*, reported 3rd vol. Sug. Vend., Appendix, No. xviii. 10th edit.

(2) *Ibid.*; and see 2nd resol. *Nicholls* v. *How*, 2 Vern. 389.

(3) 3 Sug. Vend. 73, 10th edit.

Nor on voluntary settlements.

And since such is the law, in its application to the conveyance of property, for a valuable consideration, it follows, as a natural consequence, that the assignment of an outstanding term will not protect the inheritance of the fee against the crown's debt, in the case of a settlement purely *voluntary*. Thus where A., having by marriage articles, dated in 1796, covenanted to settle certain lands to uses in strict settlement (which lands were to be purchased subsequently), in 1808, entered into bonds to the crown, and in 1812 purchased lands in fee, and had a mortgage term assigned to a trustee to attend the inheritance, and the estate then settled to the uses declared by the articles, under which he himself only took a life interest; it was held, that the term afforded no protection (1).

Where term never assigned on behalf of crown debtor, it will not be bound to crown debts in the hands of a purchaser without notice.

But, a term of years, originally created out of an estate, purchased by a person who afterwards became indebted to the crown, to secure a sum of money, due by one of the vendors, and vested in a trustee for that purpose; and after several mesne conveyances, assigned to a trustee for another purchaser of the estate, for a valuable consideration, without notice, to attend and protect the inheritance, such latter purchaser claiming directly under the first incumbrancer, by a title paramount to the crown debtor, is not liable to an extent for a crown debt (2).

Inquiry requisite on the part of purchasers and mortgagees.

Purchasers and mortgagees are, it is seen, therefore bound to institute the strictest inquiry as to the liabilities, and the office of vendors, in order to indemnify and protect themselves against the incumbrances that may thus attach on the land purchased. A recent statute (3) has rendered this obligation of less difficulty than heretofore, and enabled purchasers to ascertain, with compa-

(1) *Rex* v. *St. John*, 2 Price, 317; *Rex* v. *Hollier*, *ibid.* 394.
(2) *Rex* v. *Lamb*, 13 Price, 649; M'Clel. 402, *S. C.*
(3) *Vid.* 2 Vict. c. 11, *post*, page 127.

rative facility, the particular liabilities of the parties with whom they deal.

Inrolment and docketting of recognizances formerly not required in case of crown debts.

Formerly, the inrolment and docketting of recognizances, required by the statute of frauds, as well as by various subsequent statutes, to render them binding against the lands, tenements or hereditaments of a purchaser *bonâ fide*, and for valuable consideration, were unnecessary in the case of recognizances on account of the crown, and of obligations in the nature and of the quality of statute staple (1).

Recognizances entered into not to affect purchasers, unless duly registered as directed.

By the 2 Vict. c. 11, s. 8, it is now, however, enacted "That no judgment, statute, or recognizance which shall thereafter be obtained or entered into in the name, or upon the proper account, of her Majesty, her heirs or successors, or inquisition by which any debt shall be found due to her Majesty, her heirs or successors, or obligation or specialty which shall thereafter be made to her Majesty, her heirs or successors, in the manner directed by an act passed in the thirty-third year of the reign of his late Majesty King Henry the Eighth, intituled 'The erection of the court of surveyors of the king's lands, and the names of the officers there, and their authority,' or any acceptance of office which shall thereafter be accepted by officers whose lands shall thereby become liable for the payment and satisfaction of arrearages under the provisions of the act passed in the thirteenth year of the reign of her late Majesty Queen Elizabeth, intituled 'An act to make the lands, tenements, goods and chattels of tellers, receivers, et cætera, liable to the payment of their debts,' shall affect any lands, tenements or hereditaments, as to purchasers or mortgagees, unless and until a memorandum or minute, containing the name and the usual or last place of abode, and the title, trade or profession, of the person whose

(1) 29 Car. 2, c. 3, s. 18; 5 Ann. c. 18; 6 Ann. c. 35; 7 Ann. c. 20; 8 Geo. 1, c. 25; 8 Geo. 2, c. 6.

estate is intended to be affected thereby, and also in the case of any judgment the court and the title of the cause in which such judgment shall have been obtained, and the date of such judgment, and the amount of the debt, damages, and costs thereby recovered, and also in the case of a statute or recognizance the sum for which the same was acknowledged, and before whom the same was acknowledged, and the date of the same, and also in the case of an inquisition the sum thereby found to be due, and the date of the same, and also in the case of an obligation or specialty, the sum in which the obligee shall be bound, or for which the obligation or specialty shall be made, and the date of the same, and also in the case of acceptance of office, the name of the office and the time of the officer accepting the same, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book, to be intituled 'The Index to Debtors and Accountants to the Crown,' in alphabetical order, by the name of the person whose estate is intended to be affected by such judgment, statute, or recognizance, inquisition, obligation, or specialty, or the acceptance of any office; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and all persons shall be at liberty to search the same book, and also the other book to be kept according to the provisions of the said recited act of the first and second years of the reign of her present Majesty, or either of the said books, on payment of the sum of one shilling, whether one only or both of the said books shall be searched, and no multiplication of books is to increase the fee."

Registry to be open to inspection.

Sec. 9, enacts "That whenever a quietus shall be obtained by a debtor or accountant to the crown, and an office copy thereof shall be left with the senior master of the said Court of Common Pleas, together with a certificate, signed by the accountant-general, that the same

Quietus to debtors or accountants to the crown to be registered.

may be registered, the said master shall forthwith enter the same in the said book of debtors and accountants to the crown, in alphabetical order, by the name of the person whose estate is intended to be discharged by such quietus, with the date, and shall for any such entry be entitled to a fee of two shillings and sixpence."

CHAPTER VIII.

SIMPLE CONTRACT CROWN DEBTS.

LIEN ON CHATTELS PERSONAL.

Priority of crown debts, and lien on chattels:

In the preceding chapter, I took a view of the law bearing upon the rights of the crown, in respect of debts by bond or other specialty, and of its operation, as creating a lien on real estates in the hands of a debtor or subsequent purchaser. I propose next to consider the effect of crown debts, as constituting a lien on the *chattels* of a subject, and the priority to which they are entitled over judgments obtained by the latter.

Until debts of record, they constitute no lien on real estate.

Simple contract debts, due to the crown, if not recorded, nor having, under statutary enactment, the force and effect of debts of record, are not binding against a debtor's land (1). To constitute debts of record, they must either be found upon inquisition (of which the record was formerly called an *office*, now a *ministerial* record), or, in ordinary course, by judgment of the court (when the record is called a *judicial* record) (2). When thus recorded they attach as a lien upon the land *then* in the debtor's possession, as well as upon his goods and chattels of every description.

(1) *Rex* v. *Smith*, Wightw. 34.
(2) Mann. Exch. Pr. 1, 2nd edit.

Teste of extent, the day it issues.

The extent should be tested as of the day when it issues. It ought not to be antedated, lest it may affect intervening transactions and disturb property in the hands of remote vendees (1). Where therefore a fiat for an extent had been granted, and, after the lapse of more than a year, application was made to the court for an immediate extent, tested of the date of the fiat, the court refused to grant it, notwithstanding an affidavit of danger and other proceedings had been filed at the office when the fiat was signed; for the rule, *vigilantibus non dormientibus subserviunt leges*, applies to such case, even against the crown (2).

Stat. of frauds binding goods of a debtor from delivery of *fi. fa.* to sheriff, does not apply to the crown.

By the statute of frauds, 29 Car. 2, c. 3, s. 16, the goods of a debtor are, in general cases, bound only from the delivery of the writ of *fieri facias* to the sheriff. Formerly they were bound from the *teste* of the writ; and, as regards the rights of the crown, which is not named in that statute, they still continue so bound, at the present period.

How far sale, &c. of goods available before right of crown attaches.

If, before the power of seizure accrues to the crown, a debtor alienate his goods, the alienation is binding against the crown (3); and it has been held, upon like principle, in various instances, that a lien which has previously attached, shall prevail against an execution of the crown subsequently tested (4).

Title of crown commensurate with interest of debtor.

The title of the crown is commensurate only with the interest of its debtor, and may therefore be defeated by any event under which such interest is determined. Thus, where a lease contained a clause of re-entry, in

(1) Per Wood, B., in *Rex* v. *Bruce*, Mann. Exch. Pr. 27 (*n*); *Rex* v. *Harvey*, 7 Price, 238; *Rex* v. *Mann*, 2 Str. 749.

(2) *Rex* v. *Maberley*, 2 Cr. & M. 537; 2 Dow. P. C. 383.

(3) *Fleetwood's case*, 8 Co. 171.

(4) *Rex* v. *Humphery*, M'Clel. & Y. 173; *Rex* v. *Lee*, 6 Price, 369; *Casberd* v. *Ward*, 6 Price, 411; but see *contra*, where party claiming had notice of crown debt, *Broughton* v. *Davis*, and same v. *Att.-Gen.*, 1 Price, 216.

case the term should be seized or taken in execution, it was held, that an extent issued by the crown, enabled the lessor to take advantage of the forfeiture, and the right of the crown was defeated by the same event (1).

Diem clausit extremum.

A *diem clausit extremum* is an extent against the property of a deceased debtor, founded on a debt by *simple contract* or otherwise, found by inquisition after his death, if not already of record, and binds the *lands* from the death of the debtor, or in case of a pre-existing lien, from the time when the lien attached (2).

Priority of extent over execution at the suit of a subject.

The general question, as to how far the king's writ of extent has priority over that of a subject, has been much debated, but it seems now to be settled, that goods seized under a *fieri facias* at the suit of a subject, are, *before sale*, liable to be taken by virtue of the king's extent, tested after delivery of the writ to the sheriff (3).

33 Hen. 8, c. 39.

By the 33 Hen. 8, c. 39, s. 74, if any suit be commenced or taken, or any process be awarded for the king, for the recovery of any of the king's debts, the same process shall be preferred before the suit of any person or persons. And the king, his heirs, and successors, shall have first execution against any defendant or defendants, for his said debts, before any other person or persons; provided the king's suit be commenced before judgment given for such other person.

Where *fi. fa.* levied, but no sale effected, execution by crown preferred.

This provision, it has been determined, applies to all cases where the goods of a debtor are merely taken in execution but not sold; for until the property is altered and transferred absolutely from the debtor by sale and delivery, the crown's execution is to be preferred (4).

(1) *Rex* v. *Topping*, M'Clel. & Y. 544.

(2) Mann. Exch. Pr. 16; 12 Price, 537.

(3) *Rex* v. *Wells*, 16 East, 278 (*n*); *Giles* v. *Grover*, 9 Bing. 128, overruling *Rorke* v. *Dayrell*, 4 Term Rep. 402; and *Uppom* v. *Sumner*, 2 Wm. Bl. 1294.

(4) *Rex* v. *Sloper*, 6 Price, 114.

Thus, process sued out by the crown against a defendant, to recover penalties upon which judgment for the crown was afterwards obtained, has been held to entitle the king's execution to have priority before the execution of a subject which had issued, and been commenced on a judgment recovered against the same defendant, prior to the king's judgment, but subsequently to the commencement of the king's process; the king's writ of execution having been delivered to the sheriff before the actual sale of the defendant's goods, under the plaintiff's execution (1).

When sale completed, crown execution has no priority.

But, where the goods have been sold under a prior writ of *fieri facias* issued by the subject, or, in other words, when the execution has been executed, and the property changed, the fruit of the sale is the property of him, to satisfy whose debt the goods have been seized and sold. Thus, where goods had been seized under a *fieri facias*, and part were sold on the Saturday, and the remainder on the Monday following: an extent, *tested on the Monday*, was put into the sheriff's hands at six o'clock, after the goods had been delivered to the purchasers, and the money received by the sheriff; it was held, that the latter was bound to pay over the proceeds of the sale to the execution creditor; and the fiction of law that, inasmuch as there is no fraction of a day, the writ of extent must be deemed to have issued at the first moment of the day on which it was tested, was not allowed to prevail against the justice of the case (2).

If crown allows sale, it cannot afterwards interpose.

So, if the crown suffer the goods to be sold under a *fieri facias* before it interposes, its process is too late, whether sued out before or after judgment obtained by the subject (3).

Binding against distress before sale.

An extent has, upon the same principle, priority over

(1) *Butler* v. *Butler*, 1 East, 338.

(2) *Swain* v. *Morland*, 1 B. & B. 370; 3 Moore, 740, *S. C.*

(3) *Att.-Gen.* v. *Fort*, reported in a note to *Rex* v. *Giles*, 8 Price, 364.

a distress for rent, when issued before the sale of the articles distrained upon (1).

In bankruptcy, right of crown depends on priority of *teste* of writ, over appointment of assignees.

In cases of bankruptcy, the title of the crown depends upon priority of the teste of the writ, over the appointment of the assignees. Formerly the crown had execution of the bankrupt's property, under any extent tested previously to the assignment (2). As the property is however now vested in the assignees by the mere fact of appointment (3), the teste of the writ has relation to this period.

Lien for land-tax on bankruptcy of collector.

A collector of land-tax, indebted to the crown fo money collected, is a debtor to the king, though the division in which it has been collected, may be liable to make good his deficiencies; and although the warrant of the commissioners of the land-tax be not equal to an extent, so as to bind the goods from the date, yet, if a collector become bankrupt, and his goods be afterwards seized under a warrant from the commissioners, before an actual execution of the appointment of assignees, the king's debt must be satisfied (4).

Where extent is set aside, and a second issues.

Where personal estate was seized under the crown's

(1) *Rex* v. *Cotton*, 2 Ves. Sen. 295.

(2) *Rex* v. *Arnold*, 7 Vin. Abr. 104; *ex parte Russell*, 19 Ves. J. 165; *Rex* v. *Mann*, 2 Str. 749.

(3) 1 & 2 W. 4, c. 56, s. 25. "When any person hath been adjudged a bankrupt, all his personal estate and effects, present and future, which by the laws now in force may be assigned by commissioners acting in the execution of a commission against any bankrupt, shall become absolutely vested in and transferred to the assignees or assignee for the time being, by virtue of their appointment, without any deed of assignment for that purpose, as fully to all intents, as if such estate and effects were assigned by deed to such assignees, and the survivor of them: and as often as any such assignees shall die, or be lawfully removed, and a new assignee duly appointed, all such personal estate as was then vested in such deceased or removed assignee shall, by virtue of such appointment, vest in the new assignee, either alone or jointly with the existing assignees, as the case may require, without any deed of assignment for that purpose."—Sec. 26, passes real estate in like manner.

(4) *Brassey* v. *Dawson*, 2 Str. 978; *Rex* v. *Jones*, 8 Price, 108.

extent, which was afterwards set aside for irregularity, and the effects were ordered to be given up to the assignees of the debtor, duly appointed under a commission of bankruptcy, sued out after the teste of the extent; and a second extent, tested the day the first was set aside and subsequently to the assignment, was issued, and delivered to the sheriff, before the execution of the order for delivery of the goods to the assignees, the sheriff still holding them in his custody, it was held, that the property in the effects had been changed and transferred by the assignment, that the crown had no lien thereon, and that, consequently, the assignees were entitled to reduce them into possession (1).

Extents in aid, &c.

Extents in aid, and extents in various degrees, may be granted at the instance of crown debtors against their debtors, either for the benefit of themselves or to aid the payment of crown debts, and by this means, debtors of the crown have frequently contrived to gain priority before other creditors (2). The facility of obtaining the prerogative process by extent in aid has been, however, restricted both by statute, and by a rule of court (3), and now no fiat for an extent in aid will be granted, unless the party applying for the same, or some person or persons on his behalf, shall make affidavit, that if the process of extent for the debt due to him from his debtor be not forthwith issued, the debt due to the crown from the party applying will be in danger of being lost.

Priority of extents over each other.

It will be sufficient to observe in regard to the priority of extents of various kinds over each other, that an immediate extent, and an extent in chief in the second or any other degree, are to be satisfied before an extent in

(1) *Rex* v. *Marsh*, M'Clel. & Y. 250.

(2) *Rex* v. *Blatchford*, 1 Anstr. 162; *Rex* v. *Giles*, 8 Price, 293; *Rex* v. *Shackle*, 11 Price, 772.

(3) 57 Geo. 3, c. 117; Reg. Gen. Exch. June 22nd, 1822; and see *Rex* v. *Bingham*, 1 Cr. & M. 862; 2 Cr. & J. 131.

aid of a prior teste, where the same goods have been seized under both extents, although the inquisition on the latter has been taken before the former, and on the same day as the inquisition on the immediate extent, and the *venditioni exponas* on the extent in aid has been tested before that which issued on the extent in chief, in the particular degree (1).

Excise duties attach as a lien upon all goods whereon they are chargeable, into whatever hands they pass.

By the 28th section of the 7 & 8 Geo. 4, c. 53, entitled "An Act to consolidate and amend the laws relating to the collection and management of the revenue of excise throughout Great Britain and Ireland," it is enacted, that in order to secure the duties of excise from time to time due and owing and in arrear from any person or persons carrying on any trade or business under or subject to any law or laws of excise, and on or by whom such duties shall have been charged or become payable, and for the enforcement of all penalties incurred, by any person or persons, for any offences committed against the act, or any other act or acts of Parliament relating to the revenue of excise, all goods and commodities for or in respect whereof any duty or duties of excise is, are, or shall be, by law imposed, and all materials, preparations, utensils, and vessels for the making thereof, or by which any such trade or business shall have been carried on, in the custody or possession of the person or persons carrying on such trade or business, or in the custody or possession of any other person or persons, to the use of, or in trust for, the person or persons carrying on such trade or business, shall be and remain subject and liable to, and the same are hereby made chargeable with, all the duties of excise which during the time of any such custody or possession shall be charged or become chargeable, or be in arrear or owing, from or by the person or persons carrying on

(1) *Rex* v. *Larking*, 8 Price, 863.

such trade or business for or in respect of the same, or of any such or the like goods and commodities respectively; and shall also be and remain subject and liable to all penalties and forfeitures which, during any such custody or possession, shall be incurred by the person or persons carrying on such trade or business, for any offences by such person or persons committed against the act, or any other act or acts of Parliament relating to the revenue of excise; and all such goods, commodities, materials, preparations, utensils, and vessels shall be and remain subject and liable to all such duties, penalties and forfeitures, into whose hands soever the same shall afterwards come, or by what conveyance or title soever the same shall be claimed: and it shall be lawful in all such cases to levy thereupon such duties, penalties and forfeitures, and to use such proceedings for the recovery or enforcement of such duties, penalties and forfeitures respectively, as may lawfully be done in cases where the debtors or offenders are the true and lawful owners of such goods, commodities, materials, preparations, utensils, or vessels (1).

Goods of a bankrupt.

The property in respect of which the duties arise remains liable to this lien of the crown, as well in the hands of the assignees of the debtor as in his own (2).

Accordingly, where a candle-maker, being in arrears for single duties, became a bankrupt, and was convicted in double duties (by reason of the non-payment), subsequently to the assignment of his effects, it was held, that the double duties attached as a lien on the candles, utensils, and materials in the hands of his assignees (3).

Lien of the crown confined

But, inasmuch as the lien of the crown for duties in arrear is divisible, and confined to the several specific

(1) See *Rex* v. *Dale*, 13 Price, 739; *Rex* v. *Watson*, *ibid.* 6; *Rex* v. *Evans*, 9 Price, 366.

(2) *Att.-Gen.* v. *Senior*; and *Rex* v. *Fowler*, Doug. 400 (*n.*)

(3) *Stracy* v. *Hulse*, Doug. 400.

matters in respect of which the various several sums for the duties have accrued, the whole is not liable generally to the satisfaction of the duties arising on each several part (1). Hence, under the repealed statute, 3 Geo. 4, c. 95, s. 10, which gave a lien for arrears of stage-coach duties upon the coaches, horses, harness, &c., employed therein, it was held, that the duties attached as a lien upon the particular coach on account of which they were payable, and not upon the general stock (2). to the particular matters liable to duties.

And where a soap-maker, having incurred a forfeiture for concealing soap, contrary to the 1 Geo. 1, c. 36, became a bankrupt, and a provisional assignment of his effects was thereupon made, after which the soap was condemned, and the bankrupt convicted, it was held that, without deciding the question whether such forfeiture constituted a lien on the specific articles on which the duties had attached, yet a warrant to levy the penalty *on the goods of the bankrupt generally* was bad, and would not justify a seizure of soap in the hands of his assignees (3).

No goods can be taken under any process except distress by landlord for rent, without payment of arrears of assessed taxes, not exceeding one year.

No goods or chattels whatever, belonging to any person or persons, at the time any of the duties to be assessed under the regulations of the act relating to the duties under the management of the commissioners for the affairs of taxes, become in arrear, are liable to be taken by virtue of any execution or other process, warrant, or authority, or by virtue of any assignment, on any account or pretence whatever, *except at the suit of the landlord for rent*, unless the party at whose suit such execution or seizure shall be sued out or made, or to whom such assignment shall be executed, shall, before the sale or removal of such goods or chattels, pay, or cause to be paid, to the collector or collectors of the duties, all

(1) *Rex* v. *Dale*, 13 Price, 739.
(2) In *re Day*, M'Clel. 384.
(3) *Austin* v. *Whitehead*, 6 Term Rep. 436.

arrears thereof due at the time of seizing such goods or chattels, or which shall be payable for the year in which such seizure shall be made; provided the duties shall not be claimed for more than one year; and in case such duties shall be claimed for more than one year, then the party at whose instance such seizure shall have been made, paying the collector or collectors the duties due for one whole year, may proceed in his seizure as he might have done if no duties had been so claimed; but, in case of refusal to pay the duties, the collector or collectors are authorized and may distrain such goods and chattels, notwithstanding such seizure or assignment, and proceed to the sale thereof according to the act, in order to obtain payment of the whole of the duties so assessed, together with the reasonable costs and charges attending such distress and sale (1).

CHAPTER IX.

LIS PENDENS.

Lis pendens.

THOUGH not strictly within the prescribed range of lien, yet, in its effect and operation, the doctrine of *lis pendens* is so nearly connected with that subject, that a brief consideration of its nature and consequences may not be deemed altogether irrelevant. The provisions of a recent act of Parliament have allied the subjects yet more closely by rendering necessary the registration of the title and particulars of a pending suit, before a purchaser can be affected by it (2). The like registration, it

(1) 43 Geo. 3, c. 99, s. 37, relating to all duties under the management of the tax office (except land tax). The 5 & 6 W. 4, c. 20, s. 13, has since provided that arrears of assessed taxes shall be recoverable as a debt of *record* to the king.

(2) 2 Vict. c. 11.

has been seen, is also required in the case of judgments and crown debts, and facilities are now afforded for guarding equally in each case, against that insecurity of title to which purchasers of land were formerly subjected.

Doctrine of *lis pendens*.

The doctrine of *lis pendens*, according to the rule of Lord Bacon, is to invalidate all titles to land, with which purchasers may become invested by either of the parties to a pending suit (1); that is, a purchaser, during such pendency, is bound by all decrees made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so derived; for it is, as to them, as if it had not been acquired at all. Suits would otherwise be interminable, or, which would be the same in effect, it would be in the pleasure of one party, at what period the suit should be determined. The rule may sometimes have operated with hardship upon those who have purchased without actual notice; yet general convenience seems to have required its adoption (2), and it has been accordingly recognized and acted upon by the court in all subsequent practice.

What formerly deemed notice of *lis pendens* to a purchaser.

Formerly a pending suit was, of itself, held to amount to an implied notice to purchasers, for being a transaction in a sovereign court of justice, it was supposed that all persons were attentive to what passed there; and it was to prevent a greater mischief that would arise by people's purchasing a right under litigation and in contest (3).

Decree, when notice.

So a decree, not putting an actual conclusion to the suit, was considered to convey such notice to a purchaser; but otherwise, if the decree were final (4).

(1) Arg. Cha. Ca. 151; Vin. Abr. tit. "*Lis pendens*," (B.)

(2) *Bishop of Winchester* v. *Paine*, 11 Ves. J. 194, per Sir W. Grant, M. R.

(3) *Worsley* v. *Earl of Scarborough*, 3 Atk. 392; per Lord Hardwicke, *Preston* v. *Tubbin*, 1 Vern. 286.

(4) *Worsley* v. *Earl of Scarborough*, *supra*.

Actual notice required against registered conveyance.

A registered conveyance could be postponed only by actual notice of a *lis pendens* (1).

Subpœna not a *lis pendens*, unless bill filed.

A subpœna served, and bill filed, is a *lis pendens* against all persons; but the service of a subpœna without the actual filing of a bill, is not so. On the bill being filed, the *lis pendens* commences from the service of the subpœna, though it be not returnable till the next term, and though the party lives never so remote (2).

Must be a continued prosecution of suit.

Where a man is to be affected by a pending suit, there ought to be a close and continued prosecution of it (3). In order to constitute a *litis pendentia*, there must be a continuance of *litis contestatio*, and something must be done to keep it alive and in activity (4).

Interpretation of maxim, *pendente lite nihil innovetur*.

The maxim, "*pendente lite nihil innovetur*," has been interpreted to extend only to invalidate conveyances made by an actual party to the suit—that is, they vest no right, and have no effect with regard to the beneficial interests of parties to the cause. It does not absolutely annul and render inoperative all conveyances made at any time, or in any suit, but only such as are made by an identical party to a particular suit (5), the effect of which may be to injure or diminish the rights of his opponent.

Rule applicable to mortgages, &c.

The rule is applicable to mortgages and every other incumbrance created subsequently to the commencement of a suit (6), as well as to purchases (6).

Grantee of heir bound pending a suit.

If an heir at law having got possession of an ancestor's estate immediately upon his death, and during a suit in court for establishing the will of the ancestor in favour

(1) *Wyatt* v. *Barwell*, 19 Ves. J. 439.

(2) Anon. Vern. 318; Pasch. 1685; *Freeman* v. *Sheen*, Cro. Jac. 340; Vin. Abr. tit. "*Lis pendens*," (A.)

(3) *Preston* v. *Tubbin*, 1 Vern. 286.

(4) *Kinsman* v. *Kinsman*, 1 Russ. & Myl. 617.

(5) *Metcalfe* v. *Pulvertoft*, 1 Ves. & B. 180; 2 Ves. & B. 200; *Daly* v. *Kelly*, 4 Dow. 417—435; *Landon* v. *Morris*, 5 Sim. 246.

(6) *Garth* v. *Ward*, 2 Atk. 174.

of devisees, conveys the estate to a stranger, and afterwards the will is established by the court, the grantee of the heir will be bound by the decree in favour of the devisees (1).

Purchaser of equity of redemption from heir.

And, where a devisee had obtained a decree to hold and enjoy an estate against the heir, who was supposed to have suppressed the will. Pending the suit, a third person, with notice of the will, obtained an assignment of a mortgage made by the testator, and then purchased the equity of redemption from the heir. The court held, that having purchased with such notice, he could not be admitted to examine the justice of the decree, nor to try at law, whether such will had been cancelled or destroyed by the testator, and declared redemption of the mortgage by the devisee (2).

Voluntary payment by a party, contrary to a decree, invalid.

Upon like principles it has been decided that a purely voluntary payment by a party, contrary to and after notice of a decree, is void, though he be no party to the suit. Thus, where a mortgagor, after notice that a decree had been made prohibiting the further interference of one of the mortgagee's executors, paid over to her a sum borrowed from the mortgagee, it was held, that he was liable to repay the amount to the other executor (3). The decree appears to have been founded upon the particular circumstances of the case, and upon this broad principle, which must govern the decision upon every other case, under circumstances of a similar nature, namely, that where a man pays money into a wrong or doubtful hand, he must abide the consequences; and a court of equity will oblige all persons to take notice of its decrees, as much as of its judgments (4).

Fraudulent conveyances

Where a conveyance has been made *pendente lite*, without any valuable consideration, and to avoid and elude a

(1) *Garth* v. *Ward*, 2 Atk. 174.
(2) *Finch* v. *Newnham*, 2 Vern. 217.
(3) *Harvey* v. *Montague*, 1 Vern. 57.
(4) *Ibid.* 126, (note); *Searle* v. *Lane*, 2 Vern. 37.

pendente lite discountenanced.

decree, it ought, it has been observed, to be highly discountenanced; but where there is a real and fair purchase, without any notice, it has been justly designated a case of extreme hardship, especially in a court of equity, to set such purchase aside (1).

The provisions of the statute referred to at the commencement of this chapter, have considerably obviated the hardship complained of, by extending to purchasers greater facility of information in reference to pending suits. It is enacted by the 2 Vict. c. 11, s. 7,

Purchasers not to be affected by any *lis pendens*, unless memorandum of such suit is duly registered.

"That no *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade, or profession of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens;* and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions therein-before contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of *lis pendens* which shall be registered under the provisions of the said act."

Purchasers, completing their purchases without due inquiry and search, can, it is seen, therefore, have henceforward, no just cause of complaint, if their titles prove defective or invalid by reason of any pending suit; for the opportunity of ascertaining the fact is now easy, certain, and unattended by much expense.

(1) *Sorrell* v. *Carpenter*, 2 P. Wms. 482.

CHAPTER X.

EQUITABLE MORTGAGES.

Equitable mortgages by the deposit of title-deeds.

I HAVE neither space, nor the intention to treat largely on the subject of Equitable Mortgages. I shall endeavour, however, to define, with as much brevity as possible, the general doctrine and principles of that species of lien which is created by the bare deposit or pledge of title-deeds. In fact, this mode of security for advances has now become of such constant recurrence, and is, in its nature, so nearly allied to the pledge of personal property, that in the discussion of the subject of lien in general, some mention of it seems altogether indispensable.

The Statute of Frauds does not prevent an equitable mortgage by deposit.

Notwithstanding that, by the Statute of Frauds (29 Car. 2, c. 3), no interest in land can pass by parol, the courts have long held that an equitable mortgage may be created by a bare deposit of title-deeds; and the stat. 9 Geo. 4, c. 14, which has extended the provisions of the former act, does not interfere with such recognised right.

Intention to charge estate implied by a deposit of the title-deeds.

Such deposit, though unaccompanied by a memorandum of the transaction, raises the inference of an intention to charge the estate to which the deeds relate; and even a deposit of part of the title-deeds has been held to raise a like presumption, and to give the holder of them a lien thereupon to the amount of the money advanced (1).

Doctrine disapproved of, but acted upon.

This doctrine, though now universally admitted and acted upon, has at various times received the strongest disapprobation of the courts (2). In *Norris* v. *Wilkin-*

(1) *Richards* v. *Borrett*, 3 Esp. Rep. 102; *ex parte Mountford*, 14 Ves. J. 606; *Boxon* v. *Williams*, 3 You. & J. 150.

(2) The first determination on this subject arose in the case of *Russel* v. *Russel*, 1 Bro. C. C. 270, which held, that a lease deposited by way of pledge, for a valuable consideration, would be supported in a court of equity

son (1), the Master of the Rolls thus expresses his disapproval of it:—"I own," he observes, "that the cases which have held the deposit of deeds to constitute a mortgage, have always appeared to me to rest on very unsatisfactory grounds. If any act appeared, so unerringly speaking its purpose, that a court could infer and execute such purpose, without the aid of any extrinsic testimony, a written declaration of the purpose might appear to be altogether superfluous. But the mere fact that the title-deeds of one man's estate are found in the possession of another, is not of this description. It is a fact that may exist without any contract whatever; or it may result from a contract, of which it does not, in any degree, discover the particulars and details. If for these we are to resort to parol testimony, the effect to be given to the possession depends not on any inference which it of itself affords, but on the evidence, by which the nature and the object of such possession shall have been ascertained; and how can that evidence be let in consistently with the Statute of Frauds? I do not see why there should be such a disposition to relieve parties from the necessity of attending to the requisitions of the statute. There is no case where a man is willing to part with his title-deeds, in which he would not also be ready to sign a memorandum of two lines, specifying the purpose for which he had parted with them. By dispensing with any written evidence of the contract, an opening is left for all the fraud and perjury which the statute was calculated to exclude. However, notwithstanding my doubts concerning the principle of the cases to which I have been alluding, I may think myself bound

against the assignees of a bankrupt depositor. Before this, the point was much doubted, and though subsequently confirmed by Lord Thurlow (see 9 Ves. J. 117), and often followed, the doctrine has been uniformly disapproved of upon principle, for the most important reasons.

(1) 12 Ves. J. 192.

to follow them as far as they have gone; but I feel no disposition to go beyond them."

The deposit of deeds, therefore, is equally effectual as a security for original loans, by the creation of an equitable mortgage, whether accompanied by a memorandum of the purpose of the deposit, or not. Since, however, a bare parol deposit may be contradicted more readily than a written memorial of the object, and is at all times viewed with great suspicion, especially where the inference sought to be established tends to the contradiction of any written instrument (1), it is more advisable, perhaps, to accompany the delivery of the deeds with an express agreement regarding the object.

Second advances secured by original deposit.

A second advance of money by a person in possession of deeds for a prior loan, may also be secured under the original deposit, provided that clear proof be afforded that such was the intended dealing between the parties.

Claim of a third party to deeds in possession of another.

But the claim of a third party to deeds already in the possession of another, is watched with greater jealousy; unless such holder be a mere trustee for the claimant, having himself made no advance; or the party claiming the lien can establish such claim by agreement or memorandum in writing (2).

Valid, if by agreement in writing.

An agreement in writing has been thus determined to create a valid lien, where the acceptor of two bills of exchange had agreed with the holder and a third party, that the bills should be paid out of the proceeds of property, the deeds of which were in the hands of such third party for sale, and an equitable mortgage was held to be

(1) *Ex parte Coombe*, 17 Ves. J. 370; 4 Mad. 249, *S. C.*

(2) *Ex parte Whitbread*, 19 Ves. J. 209; 1 Rose, 299; *Hiern* v. *Mill*, 13 Ves. J. 114; *ex parte Skinner*, 1 Deac. & Chit. 103; *ex parte Weatherall*, 11 Ves. J. 398; *ex parte Langston*, 1 Rose, 26; 17 Ves. J. 227, *S. C.*; *Edge* v. *Worthington*, 1 Cox, 212; and see *ex parte Hooper*, 1 Mer. 9, where Lord Eldon, C. expresses his regret at the latitude to which he had extended the doctrine to cover subsequent advances in *ex parte Langston*; see note to *Russel* v. *Russel*, 1 Bro. C. C. 270.

thereby constituted, subject to the lien of the third party (1).

Equitable mortgage of copyholds by deposit of copy of court-roll.

The copy of a court-roll deposited, is equivalent, as respects copyholds, to the deposit of the title-deeds of freeholds (2).

Slaves in Antigua, real property, subject to equitable mortgage.

In Antigua, slaves have been held to be real property, subject to equitable mortgage, by deposit of a deed, containing a schedule of their names, though no registry of the deposit was made (3).

Deposit of property in Scotland, when not enforceable in England.

But where, by a deposit of deeds of property in Scotland, no equitable mortgage is created by the law of that country, and it can therefore be treated only as a personal contract, not affecting the estates, such deposit cannot be enforced against the assignees of the party depositing, in a court of equity in England (4).

Extent of mortgage dependent on title of depositor.

The extent of the lien or equitable mortgage, thus created, is, of course, governed by the right and interest of the party depositing the deeds, without affecting the ulterior interests of others. The delivery over, for instance, of deeds, by the tenant for life, does not create such a lien on the estate, in the way of equitable incumbrance, as to have the effect of charging the inheritance with the sum borrowed, without showing a direct and positive assent on the part of the person entitled to the reversion, that the deeds should be delivered for that purpose. But where part of the money has been advanced to pay off a mortgage, the court has decreed the party advancing it to be entitled to the benefit of the mortgage term, and to stand in the place of the mortgagee, *quoad* the mortgage money so paid (5).

Where part of money advanced to pay off a mortgage, equitable mortgage created *pro tanto*.

(1) ***Ex parte Greenhill***, 3 Deac. & Chit. 334.

(2) ***Ex parte Warner***, 19 Ves. J. 202; ***Whitbread*** v. ***Jordan***, 1 You. & C. 303.

(3) ***Ex parte Rucker***, 1 Mon. & Ayr. 481; 3 Deac. & Chit. 704; ***ex parte Borrowdaile***, 2 Mon. & Ayr. 398.

(4) ***Ex parte Pollard***, 3 Mon. & Ayr. 340; 2 Deac. 607.

(5) ***Williams*** v. ***Medlicot***, 6 Price, 495.

Title against fee on deposit by tenant in tail.

And it has been held also, that the equitable mortgagee of a bankrupt, tenant in tail, is entitled to have his lien made good as against the fee simple of the premises, of which the bankrupt was seized as tenant in tail (1).

Deposit of wife's mortgage by husband.

A party, depositing his wife's mortgage, over which he has, *jure mariti*, a power of disposition, in order to secure a debt due from himself, may make a good alienation to such extent, against his wife surviving (2).

Transfer of deposits.

And it has been decided that mortgagees themselves may, *pro tanto* the amount due to them, transfer their deeds into the hands of third parties, so as to make the deposit available against the assignees of the depositor (3). But the right of the second depositary will, under such circumstances, be commensurate only with the interest of the party originally holding them (4).

Deposit of lease and goodwill of trade.

When the unexpired term in a house and the goodwill of a business in it, were sold in a creditor's suit, with the consent of the person with whom the lease had been deposited as a security, and brought a price less than the amount of his debt, it was held, that the equitable mortgagee was entitled to the whole of the purchase money, whether arising from the value of the goodwill, or from the value of the lease independently of the goodwill, "for the goodwill of the business is nothing more than

(1) *Ex parte Rose*, 1 Mon. & M'A. 65; *ex parte Wise*, 2 Mon. & M'A. 65; see 6 Geo. 4, c. 16, s. 65, whereby the commissioners are empowered to make sale of all lands, tenements and hereditaments, whereof the bankrupt is seised of any estate tail in possession, reversion or remainder (with certain exceptions, where the reversion is in the crown); and every deed, made in pursuance of such power, is declared to be good against the bankrupt, and the issue of his body, and against all persons whom the bankrupts, *by fine, common recovery, or any other means*, might cut off or debar from any remainder, reversion, or other interest in or out of the said lands, tenements and hereditaments.

(2) *Bates* v. *Dandy*, 2 Atk. 207.

(3) *Ex parte Smith*, 1 Ves. & B. 518; and see *Wallwyn* v. *Assignees of Shepherd*, 4 Ves. J. 119; *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

(4) *Jackson* v. *Butler*, 2 Atk. 306; *Bell* v. *Taylor*, 8 Sim. 216.

an advantage attached to the possession of the house, and the mortgagee, being entitled to the possession of the house, is entitled to the whole of the advantage (1).

Husband, before his marriage, can give trustee no lien on fund settled on wife, in opposition to appointment under a power in settlement.

A trustee, under a marriage settlement, is not entitled, by an agreement with the husband before the marriage, to a lien on a fund settled to the separate use of the wife, during the joint lives of the husband and wife, with remainder to the survivor, in opposition to a joint appointment made by them, under a power reserved in the settlement; for the property is the wife's only, and the husband has no interest in it, except through the marriage, and under the settlement. The trustee can consequently claim no right beyond the interest the husband possessed; and such interest of the husband being subjected to a power of appointment, capable of defeating the right of survivorship, must, when exercised, be carried into execution by the trustee (2).

On deeds delivered by trustees and executors.

Where executors, who were also trustees under a will, agreed to give to one of the residuary legatees, as a security for his share, a legal mortgage of real estate, part of the testator's assets, and for the purpose of having the mortgage prepared, delivered the title-deeds to his agents; it was held, that this gave him an equitable lien on the property against the executors, though not as against the other residuary legatees (3).

Equitable mortgage by partners not affected by alteration of firm.

If an equitable mortgage be created by a member of a firm, no subsequent alteration of the firm, or new arrangement in respect of the property, will affect the rights of the mortgagee. Thus, where a bankrupt, while in partnership with another, deposited a lease with a creditor, and the partnership was afterwards dissolved, under certain arrangements made between the bankrupt and the insolvent partner, the equitable mortgagee's

(1) Per M. R. *Chisum* v. *Dewes*, 5 Russ. 29.
(2) *Morris* v. *Clarkson*, 1 Jac. & W. 112.
(3) *Hockley* v. *Bantock*, 1 Russ. 141.

rights, under the original deposit, were held to be unaltered (1).

Deposit of private deeds by one partner, may be security for advances to partnership.

And a deposit of private deeds by one partner, under a written agreement, to secure payments made for him, unless confined, in terms, to the private transactions of the depositor, will warrant the detention of the deeds, for payments made on behalf of the partnership. This point was decided in an action of trover (2), brought for the recovery of title-deeds deposited on the terms contained in a letter, of which the following is a copy :—

"Mr. T. Freen.

"Sir,—You having requested me to afford you security *in the dealings which you have with me,* I have this day deposited in your hands the title-deeds to lands and property in Cheshire, together with the lease of two houses, situate in Moor-street, Saint Ann's; which I agree that you shall hold as a security for any sums of money which you may, at any time, and from time to time, pay, or be liable to pay, or guarantee to pay, for me, with interest and commission, and other lawful charges, not exceeding the sum of 5,000*l.*: and I engage, on request, to execute, at my charges, a good and valid mortgage to you of the lands, &c.

"Yours, &c.,

"J. C. Starkey."

Evidence was thereunder admitted, to prove that by verbal arrangement, the deeds had been deposited for the purpose of discharging an account due to the equitable mortgagee, from a person of the name of Barron; and that Starkey and his partners, being indebted to Barron, Starkey had called with him upon the equitable mortgagee, and deposited the deeds in question, on the

(1) *Ex parte Booth*, 2 Deac. & Chit. 52.

(2) Cor. Lord Tenterden, C. J., *Chuck* v. *Freen*, M. & M. 259; and see *ex parte Lloyd*, 3 Mon. & Ayr. 604; 3 Deac. 311, *S. C.*

understanding that Barron's account should be reduced by bills on Starkey and Co., which should be negotiated by the mortgagee; and it was on account of such bills, that the holder of the deeds claimed to detain them.

It may, however, be observed, that the deposit was confined to certain dealings referred to in the letter, and in the view of the parties at the time of the agreement. The letter itself gave the defendant no authority to incur liability, on behalf of the bankrupt, by indorsing bills or otherwise. The contemporary parol arrangement, in pursuance of which the defendant indorsed the bills, was an extrinsic and collateral fact, admissible in evidence, in order to prove that the liability had been incurred at the request of the depositor, and the admission of this evidence necessarily brought the lien within the transactions in contemplation of the parties when the agreement and the deposit were made (1).

Equitable mortgage may exist, though subsequent legal mortgage void.

An equitable mortgage may subsist, though a subsequent invalid mortgage of the premises may have been executed. Thus, where an equitable mortgagee took a legal assignment of the mortgaged premises, but the deed was not registered, pursuant to the stat. 7 Anne, c. 20, and the debtor became bankrupt, and the assignment to the assignees was registered, it was held, that although the legal assignment to the creditor was void, still the equitable mortgage subsisted, and the creditor

(1) *Chuck* v. *Freen*, M. & M. 261, (note). The case *ex parte Freen and Morrice*, 2 Glyn & J. 246, was cited, in which the Vice Chancellor had refused to establish a lien on the deeds in question, upon a petition founded on the same letter of guarantee; and the Vice Chancellor is represented to have founded his judgment on the following reason, viz. "that the expressions in the letter apply throughout to J. C. Starkey only; that if the petitioner's argument prevailed, there was no limit to the partnership or joint liability to which it might be extended. That it might be extended to money advanced to one partner on account of the partnership, without the concurrence or knowledge of J. C. Starkey." *Ibid.* And see *Garratt* v. *Handley*, 4 B. & C. 664; 7 D. & R. 144, *S. C.*

was entitled to retain the rents received by him subsequently to his legal assignment (1).

So, when a legal mortgage was executed in pursuance of an agreement on a deposit of the deeds, *but after an act of bankruptcy;* it was held, that though inoperative as a security, it did not merge the previous equitable mortgage, and that the rights of the mortgagee revived (2).

Prior equitable mortgagee preferred to subsequent purchaser with notice.

The rights of an equitable mortgagee, by the deposit of title-deeds, are moreover preferred to those of a purchaser having completed the purchase with notice of such equitable incumbrance. To this end, he may be affected by notice either in fact, or law. Thus, if a vendor being asked, acknowledges to the purchaser that the deeds are in the possession of another who is to be postponed, it would amount to *crassa negligentia* on the part of the latter, to make the purchase notwithstanding, and would raise an unquestionable inference of his knowledge of the prior incumbrance (3).

Deposit of the principal title-deed only.

The deposit of the principal title-deed with a party, as security for a debt, the others being left in the hands of the depositor's solicitors, has been held to create a good equitable mortgage (4).

Deposit of mortgage-deeds, and subsequent assignment of mortgage debt.

And where parties, who afterwards became bankrupts, deposited with their bankers mortgage deeds of certain colonial property, for securing a floating balance, and afterwards executed an assignment of the mortgage debt "in addition to the securities" then held by the bankers, though without making any assignment of the mortgage, it was adjudged, that the bankers, nevertheless, continued equitable mortgagees of the mortgaged property (5).

(1) *Sumpter* v. *Cooper*, 2 B. & Ad. 223; and see *Mestaer* v. *Gillespie*, 11 Ves. J. 626; *Taylor* v. *Wheeler*, 2 Salk. 449.

(2) *Ex parte Hervey*, 3 Deac. 547.

(3) *Hiern* v. *Mill*, 13 Ves. J. 114; and see *Dryden* v. *Frost*, 3 Myl. & C. 670.

(4) *Ex parte Chippendale*, 1 Deac. 67.

(5) *Ex parte Smith*, 2 Deac. & Chit. 271.

Subsequently acquired interest of depositor passes to the equitable mortgagee.

By the deposit of the title-deeds as security for advances, not only the interest possessed by the depositor at the time, but any subsequently accruing interest in the same premises, passes to the equitable mortgagee, for it is a clear proposition, that any new interest in premises conveyed, is subject to precisely the same equities with which the premises are clothed in the hands of the equitable mortgagee, with whom the deeds relating to them are deposited (1).

Mortgagee of term depositing deeds and subsequently purchasing equity of redemption.

Thus, where a bankrupt mortgagee of a term gave an equitable mortgage, and subsequently purchased the equity of redemption, the equitable mortgagee was declared to be entitled to security on the proceeds of the sale of the equity of redemption, if the assignees declined to take it (2).

Agreement to deposit lease when granted.

So, where a party has entered into an agreement to deposit a lease when granted, it has been held to amount to an equitable mortgage (3).

Deeds left under promise to forbear suing for a debt due.

And where deeds have been deposited under a promise to forbear suing in respect of an existing debt, although for the purpose of preparing a future mortgage, an equitable mortgage has been considered to be created (4), for the obvious object of the deposit is not to enable the completion of a legal mortgage, but to secure a debt already due, and to obtain extension of the period for the payment of it. So, it has been held that an incomplete agreement for a mortgage operates as a specific lien against creditors on the death of the party, when all the engagements are to be arranged (5).

(1) *Fector* v. *Philpott*, 12 Price, 197.

(2) *Ex parte Tuffnell*, 1 Mon. & Ayr. 620; 4 Deac. & Chit. 29.

(3) *Ex parte Orrett*, 3 Mon. and Ayr. 153; *ex parte Edwards*, 1 Deac. 611; *ex parte Jones*, 4 Deac. & Chit. 750; *sed vide Williams* v. *Lucas*, 2 Cox, 160; *Doe d. Maslin* v. *Roe*, 5 Esp. Rep. 105; and see as to agreement to deposit renewed lease, *ex parte Coombe*, 4 Mad. 249.

(4) *Keys* v. *Williams*, 3 You. & C. 55.

(5) *Burn* v. *Burn*, 3 Ves. J. 582.

Many cases have, however, determined that deeds left avowedly to enable a mortgage to be prepared, cannot be retained as security for a pre-existing debt, though such mortgage is to be made in consideration of, and for the purpose of securing it (1). The declared purpose for which the delivery is made, negatives, in such case, the presumption that the depositor intended to create an immediate pledge; for the inference adopted in establishing liens of this nature is excluded by the very terms of the delivery. But again, a contrary doctrine has been maintained in other cases, and a deposit for the express purpose of preparing the security of a legal mortgage has been held to amount to an intention to vest an immediate interest in the party for whose benefit the mortgage is intended (2).

Deeds left for the purpose of preparing a mortgage.

The grounds of the conflict in these cases are not easily discovered. In the earlier cases, the decisions were established, when an anxiety existed among the judges to restrict the latitude to which the doctrine of equitable mortgage, by the deposit of title-deeds, had been extended. Hence, perhaps, arose a limitation of the rule, so soon as any distinction would justify a departure from its general application. It is not, however, so easily to be explained, why the authorities have since conflicted, and the doctrine has been again relaxed. The cause which prevented the abrogation of the general rule, when universally deemed an inroad upon an existing statute, was the authority of earlier precedents; no precedent, however, existed against construing the delivery of deeds for the purposes of a mortgage, as a contract for conveyance, rather than a deposit, and the same learned judges by whom this limited construction

Conflicting decisions as to the effect.

(1) *Norris* v. *Wilkinson*, 12 Ves. J. 192; *Brizeck* v. *Manners*, 9 Mod. Rep. 284; *ex parte Bulteel*, 2 Cox, 243; *Brander* v. *Boles*, Prec. Chan., 275.

(2) *Ex parte Wright*, 19 Ves. J. 258; *ex parte Bruce*, 1 Rose, 374; *Edge* v. *Worthington*, 1 Cox, 211; *Hockley* v. *Banlock*, 1 Russ. 141.

has been since overruled were amongst the foremost, and most vehement, in their disapproval of the general doctrine (1). It remains yet to be seen which of these irreconcileable decisions is to be adopted.

Deeds left for a particular loan, cannot be extended to a different one.

If deeds be deposited for a specific loan, particularized at the time, they cannot be detained by the lender for a different loan. Thus, when deposited for securing £150 to be advanced in cash by discounting bills, and £150 in goods, it has been held that the security cannot be extended to £162 in cash advanced (the additional £12 being for interest and stamps on a renewed bill), although only £63 was advanced in goods; but must be limited to the £150 in cash, and £63 in goods (2).

Deposit by a debtor of the crown, when available as against prior simple contract debts.

A deposit of title-deeds by a simple contract debtor of the crown is not affected by his prior debts, if made for securing part of the purchase money to be paid in consideration of other lands sold to him; and even though he may have given his bond to the vendor for the whole amount. Nor is it necessary that the deposit should be accompanied by an agreement to execute a legal mortgage, if it be shown that the object and intent of the deposit was the security of the money. And, if the lands affected by such deposit be seized by the crown for its debt, the court will order the equitable mortgagee to be paid out of the proceeds of the sale, before the crown is satisfied (3).

Not, if mortgagee have notice of existing or probable debts.

But an equitable mortgage by an accountant of the crown, in the hands of one who has an opportunity of knowing that the depositor is, or may become, a debtor of the crown, is not available against an extent (4).

(1) Per Lord Kenyon and Lord Eldon in cases cited, *ante*.

(2) *Ex parte Hannen, re Transfield*, 1 Deac. and Chit. 407.

(3) *Casberd* v. *Ward*, 6 Price, 411. The equitable mortgagee in this case, proceeded by bill against the purchaser, the assignee of the term, the person against whom the extent issued, and the Attorney-General.

(4) *Broughton* v. *Davis*, and *same* v. *Att. Gen.* 1 Price, 216.

An agreement (by recital in a bond) on the part of a person borrowing money, that certain freehold and leasehold property shall stand pledged for the repayment of the loan, accompanied by a delivery of the title-deeds, amounting in equity to a mortgage, or right to a mortgage, creates a lien, binding as against the prerogative lien of the crown in respect of a debt accruing due to the king subsequently, and the equitable mortgagees are entitled to be first paid their principal and interest out of the produce of the sale of the premises, the property of the crown debtor, seized under an extent in chief (1).

Against a subsequently accruing debt due to the crown.

An equitable mortgage, it is conceived, would take priority over a lien for the amount of unpaid purchase money, as against the vendor. The point was early before the court (2), but as the case was decided on another ground, no decision in this respect was therefore obtained. In a subsequent case, the declaration of trust of a term in favour of a person was held tantamount to an assignment; unless such a subsequent incumbrancer *bonâ fide*, and without notice, procured an actual assignment, and the custody of the deeds respecting the term, with a declaration of the trust of it, in favour of a second incumbrancer, was held equivalent to an actual assignment of it; and therefore gave him an advantage over the first incumbrancer, which equity would not take from him (3).

Semble, Equitable mortgage will prevail against trust or lien raised in equity in favour of vendor, for purchase money.

"It must at one view be seen," observes Sir Edward Sugden (4), "how strong the analogy is between the point in question and this case. The only difference between them appears to be, that in the case decided, both the trusts were declared by the parties; whereas,

(1) *Fector* v. *Philpott*, 12 Price, 197.

(2) See *Nairne* v. *Prowse*, 6 Ves. J. 752; 2 Ves. & B. 149.

(3) *Stanhope* v. *Earl Verney*, Butler's note (1) to Co. Litt. 290, b., Ch. July 27, 1761; and see *Frere* v. *Moore*, 8 Price, 475.

(4) Sugd. Vend. vol. 3, p. 217, 10th edit.

in the case under consideration, the trust or lien is raised by equity, and not by express declaration, and the trust or equitable mortgage is generally created by the declaration of the parties; which circumstance, if it turn the scale either way, is certainly in favour of the mortgagee, who has, equally with the vendor, an equity, and does not, like the vendor, claim contrary to his own acknowledgment by his conveyance."

In one case (1) where the like question arose, the legal fee being outstanding in a trustee for securing annuities, the court held, that under the particular circumstances, as both were equities, priorities must rank according to time, and the equitable mortgage was postponed to the lien, but the principle admitted in that decision would not seem to be at variance with the authority above referred to, and it did not, in fact, appear that there had even been a deposit of the deeds.

Deposit for future credit, entitles holder to no lien for previous debts. May continue for further advances. When firm of equitable mortgagees changed, subsequent verbal agreement sufficient.

When deeds are deposited for the purpose of obtaining future credit, the person in whose hands they are placed has no lien upon them for what is due to him in respect of monies previously advanced (2). But, as before observed, a present deposit may be extended as security for all further advances. And where a firm, with whom deeds have been deposited, upon a verbal agreement, has been changed, the deposit may be enlarged by a subsequent verbal agreement, or by implication, for the security of a new sum (3).

Deposit may extend to past advances if intention can be implied.

So, if a deposit be made to secure the payment of bills of exchange accepted for the accommodation of the depositor, and the bills, when due, are, at his request,

(1) *Mackreth* v. *Symmons*, 15 Ves. J. 329.

(2) *Mountford* v. *Scott*, 1 Turn. & R. 274; *ex parte Whitbread*, 19 Ves. J. 209; *ex parte Martin*, 4 Deac. & Chit. 457.

(3) *Ex parte Lloyd*, 1 Glyn & J. 389; *ex parte Kensington*, 2 Ves. & B. 79; 2 Rose, 188; and see *ex parte Langston*, 17 Ves. J. 227; *ex parte Hooper*, 19 Ves. J. 477.

renewed, the deposit will extend to the renewed bills (1).

But, it would seem, that a solicitor cannot take security by the deposit of deeds, for bills of costs before they are incurred, and a petition for sale, by an equitable mortgagee, under such circumstances, has been discharged by the court (2). Solicitors cannot take deposit for costs not incurred.

The remedy of equitable mortgagees to compel an actual conveyance, or sale, or foreclosure, of the property comprised in the deeds deposited with them, in those cases where the depositors have not subsequently become bankrupt, is *by bill* in equity. Under this, a decree may be obtained empowering the depositor to redeem within a prescribed period, and in default, authorizing the mortgagee to sell; or the court will sometimes, under particular circumstances, direct an immediate sale (3). Remedy of equitable mortgagees to compel sale, &c. where no bankruptcy has ensued.

The general rule adopted by the court as to the redemption of mortgages, whether legal or equitable, seems, however, to restrict a sale of the property in mortgage till the lapse of six months after default in payment, or death of the mortgagor; and neither the inconvenience arising from this delay, nor the fact that, as the principal debt does not meanwhile carry interest, there is no compensation for the delay as in ordinary cases, is considered a sufficient ground for an immediate sale (4).

An exception to this rule is, where the estate has vested in an infant heir, and a sale appears to the court to be more beneficial to him than a foreclosure (5).

It was formerly considered that a party having a title Liabilities of equitable mort-

(1) *Ex parte Skinner*, 1 Deac. & Chit. 403.

(2) *Jones* v. *Tripp*, Jac. 322; *Pitcher* v. *Rigby*, 9 Price, 79; *Williams* v. *Piggot*, Jac. 602; *ex parte Laing*, 2 Mon. & Ayr. 381; *ex parte Wake*, 3 Mon. & Ayr. 329.

(3) *Ex parte Topham*, 1 Mad. 38; *Pain* v. *Smith*, 2 Myl. & K. 417; *Parker* v. *Housefield*, *ibid.* 419; *Bailey* v. *Gould*, cited 2 You. & C. 730; *Brocklehurst* v. *Jessop*, 7 Sim. 439; *Thorpe* v. *Gartside*, 2 You. & C. 730.

(4) *Miller* v. *Woods*, 1 Keen, 16.

(5) *Scholefield* v. *Heafield*, 7 Sim. 669; 8 Sim. 470; *Price* v. *Carver*, 3 Myl. & C. 157.

gagees to rent and covenants.

in equity to have a legal assignment of leasehold premises, was bound, during his possession, to a performance of the covenants, and he would therefore be compelled to take an actual assignment, where such was requisite, in order to enable the landlord to maintain an action upon the covenants (1).

Thus, where the deposit was of title deeds containing a covenant to rebuild certain premises in demise within a stated period (1), or for the payment of a stipulated rent (2), or to erect a number of houses according to a particular plan (3).

The authority of these cases has been, however, impugned by a more recent decision (4). "The utmost effect of the deposit of a lease," observes the Vice Chancellor, in the case referred to, "is to create a contract to assign the interest of the lease to the depositary; and a man is not obliged, because he has a contract, to take an assignment. He is at liberty to exercise his option; and unless he does so, by filing a bill of foreclosure, or where there is an express agreement for a sale, by taking steps to effect the sale, and filing a bill for specific performance, he stands, to all intents and purposes, in the character of a total stranger to the tenancy, and with him the landlord has no right to interfere." The Vice Chancellor applies these remarks to cases of mere deposit, unaccompanied by actual possession on the part of the depositary; and it would seem to be now decided, that under such circumstances, no liability attaches, under which he can be compelled to perform the covenants of the lease.

When possession taken.

If possession be actually taken by the equitable assignee of leasehold premises, a liability to payment of

(1) *Lucas* v. *Comerford*, 1 Ves. J. 235; 3 Bro. C. C. 166, *S. C.*

(2) *Flight* v. *Bentley*, 7 Sim. 149.

(3) *Jenkins* v. *Portman*, 1 Kee. 435.

(4) *Moores* v. *Choat*, 8 Sim. 508; 3 Jurist, 220, *S. C.*; Jarman's Precedents of Conveyances, vol. 5, p. 133, 3rd edit.

the rent attaches meanwhile, but such liability may at any time be discharged by yielding up the tenure, in the same manner as a legal assignee of such premises may exonerate himself from further payment, by assigning over his interest to a mere pauper (1).

Rights of equitable mortgagees against bankrupts.

The validity of deposits by parties, who have subsequently become bankrupt, has been admitted in a long series of cases (2). In considering the rights and remedies of equitable mortgagees, under such circumstances, as against the assignees of the depositor, I shall endeavour to define,

1st. Their remedy by proof under the fiat:

And 2ndly. The mode to be adopted for the purpose of obtaining an order for the sale of the premises in mortgage.

6 Geo. 4, c. 16, s. 108.

By the statute 6 Geo. 4, c. 16, s. 108, it is enacted, that "no creditor, having security for his debt, or having made any attachment in London, or any other place, by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a rateable part of such debt, *except* in respect to any execution or extent served and levied by seizure upon, or any mortgage of, *or lien upon*, any part of the property of such bankrupt, before the bankruptcy."

Securities not relinquished by proof of debt under *fiat*.

Securities by way of equitable mortgage or lien, are not relinquished by proof of the creditor's debt, but before he tenders his proof, he ought either to have sold the subject of the security, or to have obtained an order empowering him to take the security at a valuation, and to prove for the balance.

(1) *Fagg* v. *Dobie*, 3 You. & C. 96.

(2) *Jones* v. *Gibbons*, 9 Ves. J. 411; *Monkhouse* v. *Corporation of Bedford*, 17 Ves. J. 380; *ex parte Mountford*, 14 Ves. J. 606; *Hankey* v. *Vernon*, 2 Cox, 10; but see *ex parte Ainsworth*, 3 Mon. & Ayr. 451; where, on it appearing that the depositary had acquired the deeds under a fraudulent preference, he was ordered to deliver them up.

Equitable mortgagee from one partner for debt due from the other, may prove against the latter, and retain security: So, if debt be a joint debt.

An equitable mortgagee of one partner for a debt due from the other, may prove his debt against the separate estate of the latter, without giving up the security against the first (1); or, if the debt be a joint debt, and one partner die, he may, under like circumstances, prove against the surviving partner, who has become bankrupt, without yielding up or selling his security (2).

Bankrupt act, 6 Geo. 4, c. 16, s. 70.

The statute 6 Geo. 4, c. 16, s. 70, empowering the redemption, by a bankrupt's assignees, of conditional estates, granted by him prior to his bankruptcy, expressly includes the pledge of real estates by the deposit of deeds, and authorizes the assignees, after tender or payment of the money due in respect of such pledges, to sell and dispose of the property for the benefit of the creditors generally.

This statute has removed the great disinclination that was formerly felt to give effect to the deposit of title-deeds, as against the assignees of a bankrupt (3).

Sale authorized by the court.

If satisfied of the claim of the equitable mortgagees, and there be no subsequent claimant of the equity of redemption who dissents from a sale (4), the court will afford them, in substance, the benefit of the order of Lord Loughborough (8 March, 1794), empowering a sale, though not actually within its terms (5).

(1) *Ex parte Rogers*, 1 Deac. & Chit. 38.

(2) *Ex parte Bowden*, 1 Deac. & Chit. 135.

(3) *Ex parte Haigh*, 11 Ves. J. 404.

(4) *Ex parte Topham*, 1 Mad. 38.

(5) *Ex parte Garbutt*, 2 Rose, 78; *Pain* v. *Smith*, 2 Myl. & K. 417; and cases cited *post*, page 162, note (1). The general order applies, in fact, to legal mortgages only, *ex parte Payler*, 16 Ves. J. 434; and it was held, that an equitable mortgagee was not entitled to the cost of his application to have the property sold, although it was owing to the bankruptcy that a regular mortgage was not made. Anon. 2 Mad. 281; but in subsequent cases, *ex parte Brightens*, 1 Swans, 3; *ex parte Trew*, 3 Mad. 372; *ex parte Warry*, 19 Ves. J. 472; *ex parte Sykes*, Buck. 349, petitions to have the premises sold have been granted, and the costs of the application allowed, where the deeds have been held under a written agreement or memorandum, but not otherwise.

By such order it was directed, that upon application to the commissioners by any person claiming to be mortgagee of any part of the bankrupt's estate or effects, the commissioners should inquire whether such person was a mortgagee, and for what consideration, and under what circumstances; and if the commissioners should find that such person was a mortgagee of any part of the bankrupt's estate or effects, and no sufficient objection appeared to his title to the sum claimed by him under the mortgage, they should then proceed to take an account of the principal, interest, and costs, due upon such mortgage, and of the rents and profits received by such mortgagee, if in possession; and that the commissioners should then cause due notice to be given in the London Gazette, and in such other of the public papers as they should think fit, when and where the said mortgaged premises were to be sold before them, or by public auction at any other place, if they should so think fit, and that such sale be made accordingly; and that all proper parties should join in the conveyance to the purchaser, as the commissioners should direct. And it was further ordered, that the moneys arising from such sale should be applied, in the first place, in payment of the expenses attending such sale; and then in payment and satisfaction of what should be found due to such mortgagee, for principal, interest, and costs, and that the surplus, if any, be paid to the assignees; but, in case the moneys arising from such sale should be found insufficient to pay what should be found due to such mortgagee, then, that such mortgagee should be admitted a creditor, under the commission, for the deficiency, and receive dividends rateably with the rest of the creditors; but so as not to disturb any dividends already made. And for the better making of such inquiry, and taking of such account as aforesaid, and making a title to such purchasers, it was further ordered, that all parties should be examined by the commissioners, upon

interrogatories or otherwise, and should produce to the commissioners, upon oath, all deeds, papers, and writings, in their respective custody or power, relating to the estate and effects of the bankrupt, as the commissioners should direct.

On petition to court, equitable mortgagees may obtain order of sale.

Creditors, with whom a bankrupt has deposited the title-deeds of estates as security for their debt, may therefore, *upon petition to the court*, if it be satisfied of their claims, obtain an order that the commissioners shall ascertain what is due to them in respect of their mortgages—that the property be sold—the produce applied towards payment of expenses, and of what shall be found due to such equitable mortgagees for principal, interest, and costs—and that they shall prove for any balance that may be found due to them (1).

Court will decide whether equitable mortgage is established.

The court, in general, will not refer it to the commissioners to ascertain the existence of an equitable mortgage, but will itself decide the question (2); and when the equitable mortgage is established, a reference is made to the commissioners to take an account of what is due upon it (3).

Will not order sale where there is a subsequent mortgagee dissenting.

In case there be a subsequent mortgagee of the equity of redemption, who objects to it, there is no authority, on the petition of an equitable mortgagee, by deposit of deeds, to order a sale of the estate; his proper remedy being by bill (4).

Nor where there is any dispute;

Nor will the court interfere to order the sale of equit-

(1) *Ex parte Garbutt*, 2 Rose, 78; *ex parte Jennings*, 2 Swans. 360; *ex parte Hodgson*, 1 Glyn & J. 12; *ex parte Meux*, *ib.* 116; *ex parte Lloyd*, *ib.* 389; *ex parte Alexander*, *ib.* 409; *ex parte Wetherell*, 11 Ves. J. 398; *ex parte Langston*, 11 Ves. J. 230; *ex parte Aneley*, Buck, 292; *ex parte Fisher*, 3 Mad. 38; *ex parte Payler*, 16 Ves. J. 434; Arch. B. L. 121.

(2) *Ex parte Smith*, 1 Deac. & Chit. 441.

(3) *Ex parte Jennings*, 1 Mad. 334; 2 Swans. 360.

(4) *Ex parte Topham*, 1 Mad. 38; 2 Rose, 446.

able mortgages, in cases where there is any dispute (1); nor, in the case of adverse claimants—one claiming as equitable mortgagee, and the other under a prior lease, made by the bankrupt of the same property, where the estate of the bankrupt has no interest in the question (2); nor, where the circumstances are suspicious—as where the mortgage has been created shortly before the bankruptcy, for a very old debt, for which no interest has been paid, or where the transaction appears to have been usurious (3); nor, where it will become necessary to enter into partnership accounts (4); nor, where deeds have been deposited twelve years, without any memorandum, and the bankrupt is dead (5); nor, where the deposit is to cover future as well as present bills of cost due to a solicitor (6).

Nor where adverse claimants;

Nor where circumstances of mortgage suspicious;

Nor where necessary to go into partnership accounts;

Nor where deeds have been deposited a long period and bankrupt dead;

Nor will the court order the sale of an equitable mortgage, by private contract, though the commissioners may make such direction, if they think it expedient (7); or they may consent to abandon the property; but, in such case, the court requires an affidavit to show that the abandonment will be for the benefit of the creditors (8).

Nor a sale by private contract, but commissioners will make order.

Where all parties agree to the sale, no order is necessary for that purpose (9).

Where parties agree, no order necessary.

Where an equitable mortgagee is also assignee, a soli-

When equitable mortgagee

(1) *Ex parte Attwood*, 2 Mon. & Ayr. 24; S. P. *ex parte Aple*, 1 Mon. & Ayr. 621.

(2) *Ex parte Royds*, 3 Deac. & Chit. 292.

(3) *Ex parte Dewdney*, 2 Mon. & Ayr. 72; *ex parte Nunn re Jarmain*, 1 Deac. 393; and *ex parte Ainsworth*, 3 Mon. & Ayr. 451.

(4) *Ex parte Broadbent*, 1 Mon. & Ayr. 635; 4 Deac. & Chit. 3, Cross, J. *dissentiente*.

(5) *Ex parte Jones*, 3 Mon. & Ayr. 347.

(6) *Ex parte Wake*, 3 Mon. & Ayr. 329; 2 Deac. 352.

(7) *Ex parte Ladbroke*, 1 Mon. & Ayr. 384.

(8) *Ex parte Wright*, 1 Deac. & Chit. 573.

(9) *Ex parte Whitbread*, 3 Deac. 311.

also assignee, a solicitor appointed to sell.

citor will be appointed to take the account and conduct the sale (1).

Rent to be paid out of proceeds.

An equitable mortgagee, after sale of leasehold property, is bound to satisfy a distress for rent, out of the proceeds of the sale (2); but he cannot deduct the costs of an action brought for recovery of the money lent by him (3), nor the costs to which he has been subjected in the defence of an extent in aid (4).

Costs of actions, &c. not to be deducted.

Equitable mortgagee not entitled to rents, &c. prior to sale, except, &c.

An equitable mortgagee is not entitled to the rents, &c., prior to the date of the order for sale, notwithstanding notice to the tenants (5); but where, prior to the bankruptcy, the mortgagor absconds, and an equitable mortgagee of part of the property takes possession of that part from an agent, and a fiat issues against the mortgagor, and then the solicitor to the fiat, on behalf of the creditors and the equitable mortgagee, jointly appoints the same agent to manage the whole property, which agent is subsequently adopted by the assignees, the mortgagee, though also the petitioning creditor, is entitled to the rents from the time of his first taking possession (6).

And except, &c.

So, where a common order of sale was accompanied by a reference, to ascertain the date of the deposit of the deeds, and the certificate agreed with the statement of the equitable mortgagee, it was held, that he was entitled to the rents accruing between the original order and the time of sale (7).

(1) *Ex parte Lees*, 2 Deac. & Chit. 364; *ex parte Cowdry*, 2 Glyn & J. 272.

(2) *Ex parte Cocks*, 3 Deac. & Chit. 8.

(3) *Ex parte Fletcher*, 1 Mon. 454.

(4) *Ex parte Stevens*, 2 Mon. & Ayr. 31.

(5) *Ex parte Burrell*, 3 Mon. & Ayr. 439; 4 Deac. & Chit. 85, *S. C.*; *ex parte Alexander*, 2 Glyn & J. 275; *ex parte Scott*, 3 Mon. & Ayr. 592.

(6) *Ex parte Bignold*, 2 Mon. & Ayr. 16; 4 Deac. & Chit. 259, *S. C.*; 2 Mon. & Ayr. 214; 2 Deac. & Chit. 398.

(7) *Ex parte Thorpe*, 3 Mon. & Ayr. 441; 4 Deac. & Chit. 85, *S. C.*

The general rule is, that the rents are to be received from the date of the order for sale only, from which time the depositary is entitled to the appointment of a receiver (1). The right to the rents accrues from date of the order.

But an equitable mortgagee is entitled to receive and retain the accruing rents of the property in mortgage, even under verbal authority, so long as it be unrevoked by the depositor of the deeds. And since the assignment of the real and personal estate and effects of an insolvent debtor, under the 7 Geo. 4, c. 57, passes to the assignee only what the insolvent is entitled to, at law and in equity, the assignee cannot recover from a creditor, having such security, the rents received by him subsequent to the discharge of an insolvent debtor, under a verbal authority for that purpose, previously given (2). Right of equitable mortgagee to receive rents after discharge of insolvent debtor.

As mere possession of the title-deeds of an estate, if no other purpose be shown, is presumptive evidence, as we have seen, of an agreement that the estate itself shall be a security (3), it follows, that any writing or memorandum of the deposit is, in general, unnecessary. Till the case of *Russell* v. *Russell* (4), it was much doubted whether the bare deposit of deeds constituted an equitable mortgage, if unaccompanied by some writing to manifest the purpose; but Lord Thurlow was of opinion that the fact of the adverse possession of the deeds in the person claiming the lien, and out of the other, was a fact that entitled the court to give an interest (5). Memorandum of deposit not absolutely necessary.

A memorandum of the object is, however, advisable, because sometimes it may be of utility in vesting, in an equitable mortgagee, in case of the depositor's bank- But may be of use in some instances.

(1) *Ex parte Carlon*, 3 Mon. & Ayr. 328; 2 Deac. 333, *S. C.*

(2) *Garry* v. *Sharratt*, 10 B. & C. 716; *Sumpter* v. *Cooper*, 2 B. & Ad. 223.

(3) *Ex parte Wetherell*, 11 Ves. J. 401; *ex parte Haigh*, 11 Ves. J. 413.

(4) 1 Bro. C. C. 270.

(5) *Ex parte Coming*, 9 Ves. J. 117.

ruptcy, more extensive powers and interest than he could acquire by the bare possession of deeds. Thus an equitable mortgagee, *with a writing*, and a deposit of deeds, is entitled to costs of sale out of the produce of the mortgaged property (1). And he will be allowed such costs, upon the usual petition for sale, though the written instrument referred to, require the aid of parol testimony to explain it.

Costs of sale allowed where deposit accompanied by memorandum;

And where, after a deposit of deeds, with a written memorandum, part were returned and others substituted, without any fresh memorandum, the court held, that the costs of the usual order for sale should be allowed out of the proceeds of the sale of the substituted property (2).

Not so, where no memorandum.

But, if the deposit be, in no manner, evidenced by writing, the costs must be defrayed by the mortgagee himself (3).

Several deposits, but memoranda relating to part only.

This rule is also maintained in cases where there have been several deposits, some of which have been made with, and others without memoranda, and, in such cases, the costs of the petition for sale have been ordered to be apportioned, and to be paid, in the one case, by the equitable mortgagee, and in the other, out of the proceeds of sale (4).

Memorandum including freehold and leasehold, but latter only deposited, authorizes sale of both.

And, in case the memorandum include deeds both of freehold and leasehold estates, and, by mistake, the deeds relating to the freehold are not, in fact, deposited, the freehold property may, nevertheless, be included in the sale (5); for where a deposit of part of the deeds is accompanied by a memorandum, showing the intention to

(1) *Ex parte Trew*, 3 Mad. 372; *ex parte Brightwen*, Buck, 148; *ex parte Sikes*, Buck, 349.

(2) *Ex parte Cobham*, 3 Deac. 609.

(3) *Ex parte Vauxhall Bridge Company*, 1 Glyn & J. 101; *ex parte Brightwen*, 1 Swans. 3; Buck, 148, *S. C.*

(4) *Ex parte Thorpe*, 3 Mon. & Ayr. 441.

(5) *Ex parte Leathes*, 2 Deac. & Chit. 112.

have been the creation of a security on the whole, the court will give effect to the object (1).

Memorandum including leaseholds only, but freeholds also deposited, sufficient to obtain sale on payment of costs.

But the converse of this proposition has only been recognized to this extent—that when deeds relating to freehold and leasehold property have been deposited with an equitable mortgagee, but the memorandum accompanying the deposit has referred only to the latter, the mortgagee of the property might nevertheless pray a sale of both, subject to the payment of the costs of sale (2).

Memorandum must explain purpose of deposit, &c.

The memorandum must be explanatory of the purpose and intention of the deposit, and signed by the party depositing, or by some person authorised in his behalf; but the meaning and object of the deposit may sometimes be explained by parol testimony (3); though the court will not favour any attempt to contradict a written instrument (4).

If memorandum unstamped parol evidence admissible.

Thus, where a memorandum is inadmissible, in consequence of the want of stamp, as an acknowledgment of the extent of the security, such parol evidence will be received in its place, to prove the purpose of the deposit (5).

Not sufficient if memorandum refer to a former deposit; only;

To entitle an equitable mortgagee to the costs of sale, upon an order for that purpose, it is not sufficient where an equitable deposit has been made, accompanied with a memorandum of a debt subsequently discharged, that, on a fresh debt contracted, it is verbally agreed that the deposit shall continue as security for the latter debt (6).

Nor when drawn up, and signed without authority of depositor.

And where the clerk of a creditor claiming an equitable mortgage, drew up and signed a memorandum accompanying the deposit of a lease by a bankrupt;

(1) *Ex parte Wetherell*, 11 Ves. J. 398; *ex parte Pearse*, Buck, 525.

(2) *Ex parte Robinson*, 1 Deac. & Chit. 119.

(3) *Ex parte Haigh*, 9 Ves. J. 403; *Norris* v. *Wilkinson*, 12 Ves. J. 199; *ex parte Vauxhall Bridge Company*, 1 Glyn and J. 101.

(4) *Ex parte Coombe*, 17 Ves. J. 360.

(5) *Hiern* v. *Mill*, 13 Ves. J. 114.

(6) *Ex parte Pigeon*, 2 Deac. & Chit. 118.

which memorandum was not signed by the bankrupt, nor was it alleged that the clerk was authorised by the bankrupt to draw it, or that it was ever shown to him; it was held, that the equitable mortgagee was not entitled to his costs of sale (1).

Letters sent subsequently to loan, sufficient memoranda of deposit.

Letters sent subsequently to the deposit, have, however, been held to be sufficient memoranda to entitle an equitable mortgagee to costs, on petition for a sale (2). So, a letter from a bankrupt, desiring his creditor to hold certain deeds after payment of his own mortgage (3).

Memorandum useful to prove deposit for past advances.

And lastly, a memorandum may be of importance in case of bankruptcy, in order to adduce more satisfactory evidence of the purport and extent of the deposit, than can be afforded by parol explanation, for an equitable mortgagee is not entitled to retain title-deeds as security for past advances, in opposition to the affidavits of a bankrupt (4).

CHAPTER XI.

LIEN IN EQUITY.

IMPLIED TRUSTS.

Lien implied in equity, in cases of trust, &c.

AMONGST the various branches of lien recognized in equity, is that arising under the denomination of implied trust. None, perhaps, has received a wider application; none, certainly, has operated more beneficially or equitably in the furtherance of the manifest intention and interest of all parties.

(1) *Ex parte Reid*, 1 Deac. & Chit. 250; *ex parte Emmerton*, 3 Deac. & Chit. 654.

(2) *Ex parte Reynolds*, 2 Mon. & Ayr. 104; 4 Deac. & Chit. 278.

(3) *Ex parte Reid*, Mon. & M'A. 114.

(4) *Ex parte Martin*, 2 Mon. & Ayr. 243; 4 Deac. & Chit. 457.

Various kinds of trusts.

Of this nature is the lien upon estates in the hands of purchasers, devisees, and heirs, expressly or impliedly devised, subject to trusts for the payment of debts, or charged with the payment of legacies or annuities—that peculiar lien exercised under the doctrine of marshalling assets amongst legatees and creditors of various grades—the lien extended in favour of married women and jointresses—the lien of covenantees, upon the specific or presumed object of the covenant—and numerous others, noticed in the discussion of this subject, which have been ordinarily enforced by the courts as an interest *in rem* (1).

Estates charged by will with the payment of debts.

The firstly-mentioned lien, viz. the implied trust which is raised in favour of a testator's creditors upon his real estates subsequently alienated, depends for its existence, upon the nature and extent of the charge created by the terms of the will, and may be briefly defined.

General effect of charge, or otherwise.

In the hands of an heir or devisee, real estates are now universally assets for the payment of simple contract, as well as of specialty debts, whether charged with such debts or otherwise (2); but, in the hands of a purchaser, no lien attaches, unless the trusts of the will have expressly or impliedly rendered the estates the object of a particular charge.

No lien arises against purchasers, unless the charge be express and specific.

If estates be devised *generally* by a testator, for the payment of his debts, no lien arises upon them, after *bonâ fide* alienation to a purchaser or mortgagee, not having notice of an intended misappropriation of the purchase or mortgage money; nor are those parties liable, in such case, to see to the application of the sums

(1) *King* v. *Denison*, 1 Ves. & B. 272; *Kightley* v. *Kightley*, 2 Ves. J. 328; *Smallcross* v. *Findon*, 3 Ves. J. 379; *Keeling* v. *Brown*, 5 Ves. J. 361; *Davis* v. *Gardner*, 1 P. Wms. 187; *Chitty* v. *Williams*, 3 Ves. J. 551; *Alcock* v. *Sparhawk*, 2 Vern. 228; *Barker* v. *Duke of Devonshire*, 3 Mer. 310; *Kidney* v. *Coussmaker*, 1 Ves. J. 436; *Aubrey* v. *Middleton*, 2 Eq. Ca. Abr. 497, pl. 16; *Bench* v. *Biles*, 4 Mad. 187.

(2) See *post*, p. 171, 3 & 4 W. 4, c. 104.

paid (1). So far, indeed, has a general charge of debts upon the estates of a testator, been held to extend such exemption, that, though a purchaser be answerable where there is purely a charge of legacies, he is not so where, coupled with such charge, the testator has imposed the general payment of his debts (2).

Instances where such lien attaches.

It is only, therefore, when the respective parties are cognizant that the purchase money is paid for purposes at variance with the trust (3); or, where legacies or annuities are alone charged upon the estate (4); or, debts specifically enumerated (5), that estates are liable in the hands of a purchaser, or subsequent alienee.

Mode adopted to obviate necessity to see to application of purchase money.

To remedy the inconvenience and trouble arising from the consequent necessity, on the part of purchasers, to see that the trusts of the will under which their purchases are effected, have been faithfully discharged, by a due and proper application of the purchase money; conveyancers ordinarily clothe the trustees of a testator with power to give receipts, and at the same time invest purchasers, by express provision, with full indemnity against any mis-appropriation of the proceeds of sale. In the completion of purchases of property, subject to specific charges, of the description enumerated, it is obvious, therefore, that purchasers should either exonerate themselves from the consequence of a misapplication of the consideration money, by ascertaining that the required indemnity is afforded them by the will; or that the legacies, annuities, or debts, charged upon the estate are duly liquidated.

(1) *Ithell* v. *Beane*, 1 Ves. Sen. 215; *Smith* v. *Guyon*, 1 Bro. C. C. 116; *Horn* v. *Horn*, 2 Sim. & S. 248.

(2) *Johnson* v. *Kennett*, 3 Myln. & K. 630, reversing *S. C.* 6 Sim. 384.

(3) *Watkins* v. *Cheek*, 2 Sim. & S. 199; *Braithwaite* v. *Britain*, 1 Keen, 206.

(4) *Johnson* v. *Kennett*, *supra*; *Wynn* v. *Williams*, 5 Ves. J. 130.

(5) *Doran* v. *Wiltshire*, 3 Swans. 699.

Marshalling of assets between simple contract and specialty creditors.

As regards the marshalling of assets between a testator's simple contract and specialty creditors, the doctrine under which such equitable arrangement has been effected, is now of less practical importance than heretofore. Recent statutes, the 1 W. 4, c. 47, which relates to the lands of traders, and the 3 & 4 W. 4, c. 104, which is of general application, have been passed for the consolidation and amendment of the laws for facilitating the payment of debts out of real estate; and the court of equity now enforces by legal enactment, in cases where no specific direction is given by a testator, the same charge which it formerly recognized, when imposed expressly, or arising by implication, under the particular terms of a testator's will.

Distinction where payment of debts is directed by testator, or is made under authority of the law.

The only difference between specialty and simple contract debts, as a charge upon the real estate of a testator, is this; that unless such estate be *expressly charged* by him with the payment of his debts, it will be distributed in equity, like the personal estate, according to priority of debts; but if charged, it will be liable as equitable assets, divisible *pari passu*, amongst the creditors generally.

Real estate now universally liable to debts of deceased debtor, in hands of heir, devisee, &c.

The 3 & 4 W. 4, c. 104, enacts as follows:—"That from and after the passing of this act, when any person shall die seised of, or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customary-hold, or copyhold, which he shall not by his last will have charged with, or devised, subject to the payment of his debts, the same shall be assets to be administered in courts of equity, for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and the heir or heirs at law, customary heir or heirs, devisee or devisees, of such debtor, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors

by simple contract or by specialty, as the heir or heirs at law, devisee or devisees of any person or persons who died seised of freehold estates, was or were before the passing of this act liable to, in respect of such freehold estates, at the suit of creditors by specialty, in which the heirs were bound. Provided always that in the administration of assets by courts of equity *under and by virtue of this act*, all creditors by specialty in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract, or by specialty, in which the heirs are not bound, shall be paid any part of their demands."

Testator may render real estate equitable assets, by express charge of debts.

It is seen, therefore, that the statute interferes, in no manner, with the appropriation of a testator's estate, where he has, by his last will, charged it with, or devised it subject to, the payment of his debts; and it yet continues within his power to effect, by express direction, an equal distribution of it amongst his creditors of each degree, precisely as he might have done previously to the passing of such statute; that is, he may direct a general distribution of his property, without regard to the priority in rank of one debt to another.

Marshalling of assets between creditors.

Before the above-mentioned alteration in the law, and the extended remedies afforded against the real estate of a testator, in favour of simple contract creditors, the question of marshalling assets was of necessarily more frequent occurrence than it has since been, or is likely to be hereafter; and creditors, as well as legatees, made common resort to equity, to obtain aid in the adjustment of their claims. Prior to such period, creditors by simple contract had no right, against the real estate, except by marshalling, unless the testator thought fit to devise it for the satisfaction of his debts generally. When the devise was to that effect, the devised estates might be followed, either where no estates had descended, or where the descended estates had been al-

ready applied (1). Marshalling of assets respects two different funds, and two different sets of parties, where one set can resort to either fund, the other only to one. It is grounded on obvious equity—does no prejudice to any one—and effectuates the testator's intention (2).

Instances in which assets marshalled.

The cases in which courts of equity have marshalled real and personal assets for the payment of simple contract debts and legacies, have been thus classed (3).

1. "Where there have been specialty and simple contract debts and legacies, and lands left to *descend*. In this case, if the specialty creditors have taken satisfaction for their debts out of the personal estate, the simple contract creditors first, and then the legatees, have been allowed to stand in the place of the specialty creditors, for obtaining a satisfaction out of the lands, to the amount of so much as may have been received by the specialty creditors out of the personal estates.

2. "Where there have been specialty and simple contract debts, and *lands specifically devised*. In this case, if the creditors have taken a satisfaction for their debts out of the personal estate, the simple contract creditors have been permitted to stand in the place of the specialty creditors, for obtaining a satisfaction out of the lands, to the amount of so much as has been received by the specialty creditors out of the personal estate; but then there would be no relief for the legatees, because there was as much equity to support the specific devise of the lands, as to support the bequest to the legatees.

3. "Where the debts have been charged upon the lands. Here the legatees, having the personal estate towards their satisfaction, if the creditors took it in or towards the discharge of their debts, the legatees would be

(1) *Kidney* v. *Coussmaker*, 12 Ves. J. 154.
(2) 1 Mad. Ch. Pr. 767; *Att.-Gen.* v. *Tyndall*, 2 Eden, 211.
(3) 1 Mad. Ch. Pr. 769.

allowed to stand in their place *pro tanto*, to have a discharge out of the lands.

4. "Where simple contract debts and legacies have been both charged on the lands. In this case, the lands have been directed to be sold, and all paid equally."

Charge for payment of debts, and subsequent devise of lands.

Where a testator prefaced his will by the common direction to his trustees to discharge his debts and funeral expenses, but, in a subsequent part of it, specifically devised his real estates, the courts of equity construed the direction as a charge of such estates, and thus extended a remedy to creditors, consistent with the object of the testator himself, but unattainable in the courts of law (1).

So, where substantially the devise has appeared to be for the payment of debts, the produce of the real estate has been deemed to be equitable assets, and the specialty creditors, having exhausted the personal estate, the simple contract creditors have been held to be entitled to have the assets marshalled in their favour, for the court infers from such a devise an intention to act in conformity with the rule that equality is equity, and consequently that the object of the testator is to pay all his creditors equally (2). The effect is, therefore, to create a charge upon the land to the amount of the debts (3), and under such charge, the simple contract creditors have a co-extensive remedy with the creditors by specialty.

Where no charge made for the payment of debts.

It is not in cases of express or implied charge that the equitable power of marshalling has generally been extended. The lien in that case, attaching by the directions of the testator, was enforced by the courts as strictly as a right attaching by operation of law. It is in the absence of

(1) *Williams* v. *Williams*, 3 Ves. J. 615; *Bailey* v. *Ekins*, 7 Ves. J. 319; *Shiphard* v. *Lutwidge*, 8 Ves. J. 26; *Silk* v. *Prime*, 1 Bro. C. C. 138 (*in notis*); *Newton* v. *Bennet*, *ibid.* 134.

(2) *Soames* v. *Robinson*, 1 Myl. & K. 500; *Foster* v. *Cook*, 3 Bro. C. C. 347; *Batson* v. *Lindegreen*, 2 Bro. C. C. 94.

(3) *Barker* v. *May*, 9 B. & C. 489; 4 Man. & Ry. 336, *S. C.*

such charge, that the equitable interposition of the court has been commonly called into exercise, to prevent an unfair monopoly of the testator's funds, by bond or specialty creditors, by affording to simple contract creditors, under this doctrine, substituted satisfaction out of the real estates, to the extent of the fund subtracted by the former.

Such course of administration has obviously been produced by a strong desire on the part of the courts of equity to prevent gross injustice to creditors and others, and to compel debtors to do that which was morally right and just (1). To this end, the doctrine of marshalling assets was directed, and parties having a two-fold security for their claim were thus prevented from exhausting a fund specially and exclusively, at law, liable to the demands of simple contract creditors (2); for it is the object of the court of equity, that every claimant upon the assets of a deceased person shall be satisfied as far as such assets can, by any arrangement consistent with the nature of the respective claims, be applied in satisfaction thereof. If, therefore, one claimant has more than one fund to resort to, and another claimant only one, the first claimant ought to resort to that fund on which the second has no lien (3).

Other cases in which court will marshal.

This principle is not, however, limited to the administration of the estate of a deceased person, for a species of marshalling is applied in other cases, though the term is not technically applicable except to assets. Thus, where in bankruptcy, the crown by extent has laid hold of all the property, even against creditors, it has been confined to such property as would leave the securities of incumbrancers effectual. So, in the case of a

(1) Stor on Eq. 493; *Thomas* v. *Britnell*, 2 Ves. J. 313; 2 Pow. on Dev. by Jarman, c. 34, p. 653.

(2) *Trimmer* v. *Bayne*, 9 Ves. J. 209.

(3) *Lanoy* v. *Duke of Athol*, 2 Atk. 444; *Ord* v. *Ord*, Dick. 440.

surety, it is not by force of the contract, but that equity, upon which it is considered against conscience, that the holder of the securities should use them to the prejudice of the surety; and therefore there is nothing hard in the act of the court placing the surety exactly in the situation of the creditor (1).

The limits of this treatise will not, however, allow me (nor is it essential to its object) to travel over the wide field of inquiry that would be the consequence of a fuller and more minute investigation of the numerous cases in which the court has extended protection to claimants on single funds. The following may perhaps afford a sufficient illustration of the doctrine, as affecting the rights of creditors and legatees in the administration of a testator's assets.

Resort to personal estate, by a mortgagee, being also a specialty creditor.

Where a mortgagee of a testator's real estate, being also a specialty creditor, resorted to the personal estate, and drained the assets in discharge of his debt, the court permitted the simple contract creditors to stand in the mortgagee's stead, to the like extent, against the estate in mortgage (2). And the same authority was subsequently extended, in the case of a mortgagee of freehold and copyhold estates, by enabling the simple contract creditors to stand in the place of the mortgagee, against the copyholds, to the extent of the sum which the latter had received from the freehold estates (3).

Mortgagee of freeholds and copyholds.

Freeholds and leaseholds.

So, where the testator's real and leasehold estates were subject to a mortgage, the court imposed it upon the realty only, in order that the remedies and security of the creditors and legatees might not be damnified (4).

(1) *Aldrich* v. *Cooper*, 8 Ves. J. 381.

(2) *Ibid.*; and see *Mill* v. *Darrel*, 2 Vern. 309; *Lomas* v. *Wright*, 2 Myl. & K. 769; and, in bankruptcy, *Greenwood* v. *Taylor*, 1 Russ. & Myl. 185.

(3) *Gwynne* v. *Edwards*, 2 Russ. 289 (*in notis*).

(4) *Davis* v. *Gardner*, 2 P. Wms. 190.

Breach of trust.

And, in an instance, when the remedy against a party for breach of trust was personal, and the money produced thereby had been laid out in an estate in Ireland, which could not be specifically followed, the court so far assisted the creditors in general, as to permit the simple contract creditors to stand in the place of the specialty creditors, exhausting the personalty (1).

Debt due to the king.

Where a debt was due to the king, the court, upon like principles, ordered satisfaction of it to be made out of the real estate (2).

Marshalling in favour of legatees.

In the case of legatees against assets descended, a legatee has not been considered to have so strong a claim to this species of equity by marshalling, as a creditor; yet, on a devise of lands to pay debts, a legatee, whether specific or pecuniary, has been held to be entitled to be paid out of the lands, where the personal estate was exhausted by such creditors (3), and the same right exists where satisfaction has been taken out of the personal estate by the specialty creditors (4).

And where a testator directed his estates to be sold, and the produce to be applied in payment of the mortgages due from him, and the residue of the produce to be considered and applied as part of his personal estate; and gave and devised the residue of his real and personal estate upon trust, after payment of his just debts, for the benefit of all his children, and afterwards, by a codicil confined the residuary gift of the produce of the real estate to his younger children; it was held, 1st, that the devisees of the produce of the real estate directed to be sold, were entitled to have the personal estate applied in

(1) *Cox* v. *Bateman*, 2 Ves. Sen. 18.

(2) *Sagittary* v. *Hyde*, 1 Vern. 455; and see, as to legacies, *Bligh* v. *Earl of Darnley*, 2 P. Wms. 619; *Bonner* v. *Bonner*, 13 Ves. J. 385; *Masters* v. *Masters*, 1 P. Wms. 422; *Hanby* v. *Roberts*, Amb. 127.

(3) *Haslewood* v. *Pope*, 3 P. Wms. 323; *Aldrich* v. *Cooper*, 8 Ves. J. 381.

(4) *Tipping* v. *Tipping*, 1 P. Wms. 730.

payment of the mortgages; and 2ndly, that the pecuniary legatees were entitled to stand in the place of the mortgagees to the extent to which the mortgages had been paid out of the personal estate (1).

So, where a testator, by his will, ordered his trustees to possess themselves of his estates and substance, and to pay debts, it was held to amount to a charge upon the real estate, and the assets were marshalled in favour of legatees, so as to let them in, so far as the personal estate had paid towards the debts (2).

Charge for payment of legacies out of realty must be express.

The charge for the payment of legacies is required to be more explicit than a direction for the payment of debts—the one being deemed a voluntary charge, the other obligatory. A pecuniary legacy will not therefore be paid to the destruction of a gift of the realty, unless it manifestly appear that the testator intended it to be a primary charge upon the real estate. There must, in such case, be clear, express, and unequivocal evidence of the testator's intention, and mere introductory words for payment of debts and legacies are not sufficient indication of such a meaning (3).

A bare direction to pay debts, without devise of realty for such purpose.

A bare direction by a testator to his executors to pay his debts and funeral expenses, without giving them any other fund than the personal estate, out of which they can fulfil that duty, is not such a trust as to enable the legatees to call upon the court to throw the specialty debts upon the real estate, that enough of the personal estate may be left for the payment of the legacies, where it appears that the testator's personal estate is sufficient to discharge both species of debt (4).

Legacy charged on real estate.

If one legacy be charged upon a testator's real and

(1) *Wythe* v. *Henniker*, 2 Myl. & K. 635.

(2) *Foster* v. *Cook*, 3 Bro. C. C. 347.

(3) *Kightley* v. *Kightley*, 2 Ves. J. 328; and see *Forrester* v. *Leigh*, Amb. 171.

(4) *Keeling* v. *Brown*, 5 Ves. J. 359.

personal estate, and there be other legacies not so charged; on resort by the former to the personal estate only, the latter are entitled to satisfaction out of the real estate (1).

Charitable bequests.

A void charitable bequest *out of land*, will not be rendered valid by marshalling the assets, so as to throw it upon the personal estate (2).

Marshalling in favour of wife, for her *paraphernalia*.

A widow is not entitled to her *paraphernalia* against creditors; but if a mortgagee chooses to take them in satisfaction of his debt by bond or covenant, the court will ascertain the value, and make her a creditor for the sum upon the mortgaged estate (3); for where there is a double fund, though the court will not restrain the party, yet it will not allow him so to operate his payment as to disappoint another claim, whether arising by law, or by the act of a testator (4).

To enumerate, however, the entire instances of interference by the court in the administration of assets, would occupy greater space, and tend to a much more extended inquiry, than is deemed either requisite or desirable in the discussion of this branch of the subject. Enough has been said, it is conceived, to illustrate the equitable right, or implied and recognized lien of parties having an interest in one fund only, when resort is made to it by parties having an interest in and a right of demand upon another fund also. I may therefore now

(1) *Hamby* v. *Roberts*, Amb. 127; *Bligh* v. *Earl of Darnley*, 2 P. Wms. 620; *Bonner* v. *Bonner*, 13 Ves. J. 379; *Hamley* v. *Fisher*, Dick. 104.

(2) *Makeham* v. *Hooper*, 4 Bro. C. C. 153; *Ridges* v. *Morrison*, 1 Cox, 180; *Foy* v. *Foy*, *ibid.* 164; *Foster* v. *Blagden*, Amb. 704; *Hillyard* v. *Taylor*, *ibid.* 713; *Mogg* v. *Hodges*, 2 Ves. Sen. 52; *Attorney General* v. *Hurst*, 2 Cox, 364; *Hobson* v. *Blackburn*, 1 Keen, 273; *Williams* v. *Kershaw*, *ibid.* 274, *note*; *Bennet* v. *Musgrove*, 2 Ves. Sen. 52; *Inchiquin* v. *French*, 1 Cox, 9.

(3) *Tipping* v. *Tipping*, 1 P. Wms. 729; *Ridout* v. *Earl of Plymouth*, 2 Atk. 104.

(4) *Aldrich* v. *Cooper*, 8 Ves. J. 397; *Trimmer* v. *Bayne*, 9 Ves. J. 209.

proceed to a summary notice of a few of the numerous other cases, in which the protective authority of the court has been extended under the doctrine of implied trust.

Funds of a testator improperly paid to legatees, may be followed by creditors:

The funds of a testator may be followed by creditors into the hands of legatees, who have received payment from the executor by mistake; for the court, in such case, treats them as mere trustees for the payment of the testator's debts (1).

So money paid by executors under mistake:

And where the payment is made by the executor without due calculation, or under a misapprehension of the extent of the testator's property, the court, under the doctrine of abatement, will compel a legatee to refund the legacy paid to him, or a proportionable part of it, in case of a deficiency of assets (2).

Or for their private purposes.

So, where merchants, by the direction of an executor, their commercial correspondent, applied a fund, which they knew to be part of a testator's assets, in satisfaction of advances made by them, in the course of trade, to relieve the embarrassments of their correspondent; they were held to be responsible for the fund so applied, to general pecuniary legatees under the testator's will (3).

Stock of corporate bodies.

The stock of corporate bodies has been held a trust fund for the payment of the corporation debts, and the creditors have been declared to have a lien or right of priority of payment on it, in preference to any of the stock-holders in the corporation. Thus, for example, the capital stock of an incorporated bank is considered a trust fund for all the liabilities of the corporation; and no stock-holder can entitle himself to any dividend or share of such capital stock, till all the debts are paid.

(1) *Newman* v. *Barton*, 2 Vern. 205; *Noel* v. *Robinson*, 1 Vern. 94; *Wilson* v. *Moore*, 1 Myl. & K. 337.

(2) *Edwards* v. *Freeman*, 2 P. Wms. 446; *Nelthrop* v. *Hill*, 1 Ch. Ca. 135.

(3) *Wilson* v. *Moore*, 1 Myl. & K. 337.

And if the capital stock should be divided, leaving the debts unpaid, every stockholder receiving his share of the capital stock, will, in equity, be held liable, *pro ratâ*, to contribute to the discharge of such debts out of the fund in his own hands (1).

Estate sold subject to incumbrances not affected by purchaser's covenant to pay.

Where a man acquires an estate already burthened with some existing incumbrance, the estate continues primarily liable to the amount, and a subsequent covenant by him to pay, will not discharge the original liability of the estate, but operate as a mere auxiliary security, because the debt is not the original debt of the covenantor (2).

Estate cleared from incumbrances by wife's fortune, liable to jointure.

Where the fortune of a lady, about to be married, has been transferred to the intended husband, or to his father, for the purpose of clearing the family estate from incumbrances, it has been determined that the wife has a lien upon the estate for a jointure (3). So far, indeed, has the court extended its protection in cases of this nature, as to support the lien of a jointress upon the capital of a fund expressly invested, on her authority, and accepted by her as a fund, the dividends and proceeds of which should be paid, as a substituted annuity, and in satisfaction of her jointure, where such dividends have proved unequal in amount to the jointure, and where her release was not only manifestly inconsistent with the context and general intent of the deed, but it was apparent that her concurrence in the conveyance had been obtained upon the understanding that the jointure should not be injured. The following case is an instance where such release of a jointure was repudiated, and the like lien established.

A jointress

A jointress being entitled, under a settlement, to a

(1) Stor. on Eq. vol. 2, p. 499; *Curson* v. *African Company*, 1 Vern. 121; *S. C.* Skinner's Rep. 84, and cases cited.

(2) *Lechmere* v. *Charlton*, 15 Ves. J. 197.

(3) *Probert* v. *Clifford*, 2 P. Wms. 544; 1 Atk. 440, *S. C.*

having concurred in sale of jointured estates, entitled to lien on the invested capital arising from the sale.

rent charge of 800*l.* a year, consented, for the purpose of facilitating the sale of the settled estates, to concur with the trustees in conveying the property exonerated from her jointure, upon having it sufficiently secured; and the sum of 16,000*l.*, navy 5 per cents., part of the produce of the sale, having been invested, the jointress by a deed, declaring the trusts of the investment, agreed to accept the dividends and annual produce of the stock, in full discharge or satisfaction of her jointure rent charge of 800*l.* By the successive conversion of the navy 5 per cents. into 4 per cents., and 3½ per cents., the income arising from the original investment was reduced to 588*l.* a year. After the death of the tenant for life, the jointress filed a bill, and obtained a decree declaring that she was entitled to a lien upon the capital sum of stock which, on the sale of the estates released from the rent charge, had been set apart to answer her annuity, to the extent of the difference between the value of the reduced dividends and the 800*l.* a year (1).

Interest of remainderman no bar to such lien.

And if such concurrence of the jointress has been equally for the benefit of the remainderman, the lien will not be refused on the ground that it operates to his disadvantage (2).

Where lands settled are covenanted to be of a certain value, but prove deficient.

So, where lands, settled upon a wife for her jointure, were covenanted to be of a certain clear yearly value, but after the death of her husband, turned out to be deficient, it was held, that she was entitled to have the deficiency made good out of other lands, and to come in as a special creditor upon the husband's estate for the arrears of the deficiency, with interest (3).

Wife executing power of appointment in

And again, when a wife, having a power of appointing real estate, just after the birth of a child, and when *in*

(1) *Arundell* v. *Arundell*, 1 Myl. & K. 316.

(2) *Ibid.*

(3) *Parker* v. *Harvey*, 4 Bro. P. C. 604; 14 Vin. Abr. 458, *S. C.*; and see *Eustace* v. *Keightley*, 4 Bro. P. C. 588.

extremis, executed the power in favour of her husband, who shortly afterwards gave a bond to trustees, reciting that, upon the execution of such power, he had given the wife an assurance that he would make a provision for the child, and conditioned for securing the sum of 3000*l.* to be paid to it, on attaining twenty-one, or within six months after his decease; it was held, that such sum was a lien on the estate (1).

Favour of husband, on assurance that he will pay certain sum to child, creates lien on estate for the amount.

Amongst the many instances which might be adduced of the equitable lien of a wife upon her estate, there is one other, of extensive application, which yet remains to be mentioned, viz. the equity of a wife upon her unsettled property. This right, the policy of which has been doubted, has often operated with manifest justice in securing to the wife a reasonable and fair apportionment of the property, out of which prudent forethought might have enabled her to provide for herself an adequate allowance. This equity enables her in all cases, where she has a demand in her own behalf, and no settlement has been made before marriage, to obtain from the court an adequate provision, when called upon to interfere for the establishment of the husband's claim in her right. Such right is enforced as a lien on the wife's fortune, in all cases where it exceeds 200*l.* or 10*l.* in annual payment (unless the husband be a freeman of London), and the only mode of waiver permitted to the wife, is by examination before the court, and voluntary repudiation of her claim (2).

Equity of a wife upon her unsettled property.

Nor does the bankruptcy of the husband (3), nor a voluntary assignment by him (4), affect this right of the wife to a provision out of her fortune, for the rule not

Not affected by bankruptcy, &c.

(1) *Ex parte Atkins*, 2 You. & C. 536. This was, however, rather an arrangement between the parties than a judicial decision.

(2) See 1 Mad. Ch. Pr. 609.

(3) *Elliot* v. *Cordell*, 5 Mad. 149; *Johnson* v. *Johnson*, 1 Jac. & W. 472.

(4) *Jewson* v. *Moulson*, 2 Atk. 420.

only applies to the husband himself, but to every person claiming under him, whether by operation of law, or otherwise.

Lien of a tenant for life against remainderman for *permanent* improvements on estate.

There are also cases of implied trust, in which the courts will interfere on behalf of the owner of a limited estate, by creating a charge or lien on the estate against the remainderman, where permanent improvements have been effected. Thus, where a tenant for life of real estates had expended money in finishing a mansion-house, the erection of which had been commenced, but left unfinished by the testator, and also in repairing the mansion-house, which had been damaged by dry-rot; the court, in a suit for administering the trusts of the will, directed an inquiry whether it was for the benefit of all the parties interested that the mansion-house should be finished, and declared, that if it was found affirmatively, and there was no personal estate applicable, the expense should be a charge on the real estate; but the inquiry as to the repairs was refused, on the ground that it was an expense to which a tenant for life choosing to occupy a mansion-house must submit (1).

Lien against tenant for life, where money advanced to pay off incumbrances and title claimed through remainderman.

And again, where a party has advanced money, on behalf of a remainderman, to meet incumbrances dischargeable by a tenant for life, on the representation that the remainderman had a right to sell, with the concurrence of the tenant for life, and has thereupon obtained a draft conveyance to be made, in which the tenant for life and remainderman are made parties, and has taken possession of the estate, the court has held him to have an equitable title thereto, inasmuch as he has cleared the estate from a charge to which the tenant for life was liable; and has established a lien upon the property, by enjoining the tenant for life from

(1) *Hibbert* v. *Cooke*, 1 Sim. & S. 552; and see *Swan* v. *Swan*, 8 Price, 518.

proceeding by ejectment to obtain possession, until the equities of the parties were finally determined (1).

Interference of the courts of equity in cases of conveyance under fraudulent representation.

Lastly, there are peculiar instances of fraud, in the conveyance of estates, where equitable protection may be obtained, by the establishment of a lien or charge on the property in the hands of the party guilty of the fraud.

The following case may perhaps sufficiently illustrate the nature of transactions in which the court may be called upon to exercise its power on behalf of parties whose concurrence in the conveyance and transfer of any interest in real property has been thus fraudulently obtained.

A father fraudulently obtaining concurrence of tenant in tail in remainder, to a fine levied, held trustee for amount of money paid for estate.

Where a father, being tenant for life, with remainder to his children in tail, persuaded them to join in a deed, for the purpose of levying a fine, and died, the court (on a bill filed for the purpose of establishing a specific lien upon the money paid for the estate) held, that the signatures of the children had been fraudulently obtained by the testator, and that he must be considered a trustee for the amount; but as no agreement had been made so as to make this particular fund answerable, it was to be considered a general charge on the estate, and not a specific lien. The father had imposed upon himself an obligation, and was treated by the court as having agreed to fulfil it; all his estate was consequently made liable to such fulfilment of it, though no part of his estate was held to be so specifically affected, as to be liable to this, in preference to all other obligations (2).

General principles of equity in the establishment of lien.

Speaking of the beneficial and just interposition of the courts of equity in case of fraud, a recent writer has thus forcibly expressed himself (3). "It is the ready access to the crucible, or the immediate vicinity of the receiver, which encourages the criminal to commit

(1) *Ludlow* v. *Grayall*, 11 Price, 58.
(2) *Newcomb* v. *Burdon*, 2 Anstr. 343.
(3) Law Mag. vol. 16, p. 116.

larceny. When a fraud has been committed, the court of equity attaches a lien upon the property acquired by it, follows it to the very crucible, and seizes it in the hands of the receiver; thus the court causes discouragement to fraud, and gives ample remedy to the persons who have been defrauded. Indeed it may be said, that of all the doctrines of the court of equity, no one more fully illustrates its general character than the law of lien. A husband prays for a legacy bequeathed to his wife, but the wife has a lien upon it for a settlement in favour of herself. The vendor seeks to set aside a sale, or a mortgagor to redeem a mortgage; the relief may be granted in both instances, yet the court will pay attention to the claims of all parties, and will give to the mortgagee in one case, and in the other to the purchaser, a lien upon the property in question for the expenses incurred in its permanent improvement. The lord of the soil claims land upon which buildings have been made, or other improvements have taken place, while he has remained passive. The court of equity will not deny to him the establishment of his legal rights, except under very extraordinary circumstances, but will always enforce a fit compensation for the outlay which has taken place. Thus, he that will have equity to help, where the law cannot, shall do equity to the party against whom he seeks to be relieved" (1).

(1) Fonbl. Eq. 1, 272.

CHAPTER XII.

LIEN IN EQUITY.

COVENANTS.

Construction of covenants as a lien.

In the recognition of implied trusts, the courts of equity have established a doctrine with regard to covenants, at variance with that of the courts of law. The former deem a covenant to settle and convey particular lands, as creating a specific lien thereupon, and will decree performance of such covenant not only against the covenantor himself, but against all others claiming under him, save purchasers for a valuable consideration, who have not been affected by notice of the covenant. The courts of law, on the other hand, consider such covenants as a mere personal obligation on the part of the covenantor, enforcible only by personal action.

Agreement relative to subject, binding in equity, on subject itself.

Equity has not only recognized and decreed a lien on lands which have been the defined object of a covenant, but extending yet more widely the general doctrine, that where a man makes an agreement relative to any subject, it shall bind the subject itself, has enforced the performance of covenants, in some instances, where no particular land has been pointed out, or even possessed by the covenantor at the time of his covenant. Such covenants are, however, those only which cannot be construed into a mere personal obligation.

Covenant to appropriate produce of estate creates lien.

A covenant to appropriate a portion of the produce of a real estate, to raise a sum of money within a certain period, has been held not to amount to a mere personal covenant suable at law, but to create a lien upon the land,

entitling the covenantees to have it specifically performed (1).

So, covenant to settle *particular* lands.

So, a covenant, previous to marriage, to settle *particular* lands, binds such lands in equity, into whatever hands they may happen to fall, either by operation of law, or by the act of the party (2).

Secus, lands of certain value only, not particularized, and subsequently devised.

But where the covenant is to settle lands of a certain value on a wife, without mentioning any particular lands, no specific lien attaches on the lands of the husband subsequently dying and devising them for the payment of his debts, but the wife must come in as a creditor in general, and will be allowed to the amount of the value of her estate for life (3).

In this case, it will be observed, two circumstances concur to negative the right to lien. First, no identical lands are pointed out, and secondly, the express devise manifests a clear and obvious intention on the part of the covenantor, that the lands of which he dies possessed shall not be deemed a satisfaction of his covenant.

Where right to dower relinquished in consideration of agreement to settle.

Where, however, a general bond has been entered into to settle an annuity on an intended wife, by the conveyance of sufficient freehold or copyhold estates *in lieu of dower*, the court has established a lien upon the husband's real property, after his death, for an amount not exceeding the interest of the wife in the estate which she would

(1) *Legard* v. *Hodges*, 3 Bro. C. C. 530; *re-heard*, 4 Bro. C. C. 421; and see *Power* v. *Bailey*, 1 Ball & B. 49-52; *Roundell* v. *Breary*, 2 Vern. 482.

The case of *Collins* v. *Plummer*, 1 P. Wms. 104, turned on the distinction that an actual conveyance had been executed, the covenants of which were merely personal; and in that case the very distinction was taken between a deed executed and complete in itself, and an agreement, which being merely executory, would be construed according to the intention of the parties at the time, and may be moulded accordingly. *Vide* note to *Legard* v. *Hodges*, cited *supra*, and the cases in Mr. Cox's note to *West* v. *Erissey*, 2 P. Wms. 356.

(2) *Freemoult* v. *Dedire*, 1 P. Wms. 429.

(3) *Ibid.*

have been entitled to, if she had not accepted the annuity (1).

Equitable doctrine as to contracts.

The doctrine under which the court interferes to establish the lien is that of presumed performance (2). It is only when a contrary intention is not apparent, that the court applies the principle that "what is contracted to be done by a party is, in equity, construed as done; and what a man had undertaken to do in pursuance of a trust, he will be considered as intending to do." Thus, where a man is bound by covenant to purchase and settle lands, and purchases an estate without making such settlement, he will be presumed to have made the purchase for the purposes of the settlement; for having done an act which can be construed into a completion of the contract, he will be supposed to have intended to fulfil his obligation, unless some contrary intention be manifest (3).

Covenant to *purchase* and settle lands, binds subsequently purchased estate.

Or to pay money to trustees to buy land, and covenantor himself purchases.

So, where the covenant is, not to purchase an estate, but that the covenantor shall pay a sum of money into the hands of trustees for that purpose, and he has omitted to pay the money, and himself purchased the land, the court of equity has acted upon the like supposition that he has intended, by one means or another, to fulfil the covenant; and, as in the preceding case, has held the estate to have been purchased in pursuance of the covenant, and thus established a lien upon the purchased estate for the trusts of the settlement (4).

Unless contrary intention be manifest.

But if, as already observed, circumstances afford a contrary presumption, even in the case of a trustee for the express purchase of lands, a subsequent purchase will

(1) *Foster* v. *Foster*, 3 Bro. C. C. 489; *S. C. nomine, Tew* v. *Earl of Winterton*, 1 Ves. J. 451.

(2) See *Prime* v. *Stebbing*, 2 Ves. Sen. 409.

(3) *Lechmere* v. *Lechmere*, For. 80; *Ca. temp.* Talbot, 93; *Deacon* v. *Smith*, 3 Atk. 323.

(4) *Sowden* v. *Sowden*, 1 Bro. C. C. 581; *Wilcox* v. *Wilcox*, 2 Vern. 558; *Attorney General* v. *Whorwood*, 1 Ves. Sen. 441; *Pinnell* v. *Hallett*, Amb. 106.

not render the estate purchased liable to the trust. For instance, where a trustee for the purchase of land died without personal assets, having purchased lands, it was held, that even if the trust could have been executed during his life, which, upon the construction, was questionable, yet no part of the trust fund being traced, and the circumstances affording no presumption that the purchases were made in execution of the trust, they were held not liable (1).

So, where a sum of money was settled to the separate use of the wife, and in the event of no children, to her absolutely, surviving the husband, with power to the trustees, with her consent, to invest it in land, and the husband had obtained the money from the trustees, and invested it in land, it was decreed, that no lien attached thereupon: first, because the circumstances did not raise the presumption (*as if he had been under an engagement to purchase*) that his purchases were in pursuance of such engagement; and secondly, that it did not appear satisfactorily in evidence, that there had been any application of the actual trust fund, or that the husband was unable to purchase out of other funds (2).

Upon the same principle, purchases have been held not to be a substitution for estates sold under a power in a settlement to sell and invest the money in estates to be settled to the same uses, there being no original trust, subsequent agreement, or representation, relied on (3).

Presumption that purchase made in pursuance of covenant.

But where distinct evidence has been adduced, not only of the purchase having been made with trust money, but of the husband's intention to convey it upon the trusts of

(1) *Perry* v. *Phelips*, 4 Ves. J. 108; 17 Ves. J. 173, *S. C.* In *Garthshore* v. *Chalie*, 10 Ves. J. 1, evidence was admitted to show that the purchase was not made in performance of a covenant of this nature.

(2) *Lench* v. *Lench*, 10 Ves. J. 511.

(3) *Denton* v. *Davies*, 18 Ves. J. 499.

a prior settlement, an estate purchased by him has been held to be subject to the trust (1).

Distinction between covenant to *purchase* and settle, and agreement to settle generally.

The distinction must, at all times, be kept in mind, between a covenant or agreement to purchase and settle lands, which, from its very terms, imports a future purchase, and a similar covenant for the settlement of lands generally.

In the first case, the covenant can, of necessity, create a charge on future acquired property alone, and then only, when the subsequent purchase affords a presumption, not rebutted by positive evidence, that it is in performance of the agreement. This presumption may arise in many ways; either by the general correspondence of the estate with the terms of the covenant (2); or by the declarations or acts of the purchaser.

Covenant to settle lands generally.

In the second case suggested, viz. where the covenant is to settle lands generally, it operates to bind the land in actual possession at the time of the agreement. Thus, where A., on the marriage of his son, covenanted, within one month, to settle lands, of the value of 150*l.* per annum, to uses, in strict settlement, the Lord Keeper held, that although no lands were mentioned in the articles, yet the covenant should be a lien on the land whereof A. was then seized, unless he had purchased and settled other lands, within the time limited (3).

Effect of other covenants to settle real and personal estate.

Various other covenants attach by way of charge or lien upon real and personal estate. Thus, a covenant for the settlement on a wife, of such real estate as the husband may become seized during coverture, binds all his subsequently acquired realty (4); and a covenant to settle all future personal property, is equally binding on subsequently realized capital; and a court of equity has

(1) *Wilson* v. *Foreman*, 10 Ves. J. 519.
(2) *Tooke* v. *Hastings*, 2 Vern. 97; *Deacon* v. *Smith*, 3 Atk. 323.
(3) *Rowndell* v. *Breary*, 2 Vern. 482; confirmed, 3 Atk. 327.
(4) *Prebble* v. *Boghurst*, 1 Swans. 321; *Needham* v. *Smith*, 4 Russ. 318.

compelled the performance of the covenant, by following the property which is the object of it, in whatever manner invested (1).

Mr. Jarman observes (2), that as the covenant in these cases is to settle personalty *as such*, and not to invest it as real estate, it seems to be inaccurate to treat the real estate purchased as a subject of property within the terms of the covenant; and, in this respect, the doctrine of the cases above mentioned, has been qualified by subsequent decisions, which have established the rule to be that the land is not bound *in specie* by the uses, but is charged with the money improperly invested thereupon (3).

Lien of *cestuis que trust* on land purchased with trust money.

Cestuis que trust have a lien on lands purchased with trust moneys, though such moneys had not been directed to be laid out in the purchase (4).

No lien arises in favour of creditors under covenant by debtor to sell estate and pay their debts.

A covenant by a debtor, entered into by an indenture, with certain scheduled creditors, that he would pay their respective debts, with interest, on a given day, and where, in the event of non-payment, he engaged to sell as much of his estates as should be found necessary for that purpose, has been determined to be a mere *personal undertaking* on the part of the covenantor; and that even if it were not, it would give the creditors no specific lien on the lands, so as to enable them, in a suit for the administration of his assets, to receive payment *pari passu* with the judgment creditors (5).

(1) *Lowther* v. *Earl of Westmoreland*, 1 Cox, 64; *Randall* v. *Willis*, 5 Ves. J. 262.

(2) Bythewood's Prec. Con. vol. 9, p. 112.

(3) See *Lewis* v. *Madocks*, 8 Ves. J. 150; 17 Ves. J. 48, *S. C.*

(4) *Lane* v. *Dighton*, cited Amb. 409; *Balgney* v. *Hamilton*, *ib.* 414; *Wilson* v. *Foreman*, Dick. 593.

(5) *Berrington* v. *Evans*, 3 You. & C. 384; *Williams* v. *Lucas*, 1 P. Wms. 430, *n.*

CHAPTER XIII.

LIEN IN EQUITY.

PARTNERS AND JOINT-PURCHASERS.

Partners have, as between themselves, lien on joint stock, &c.

JOINT speculators and purchasers, upon obvious and reasonable principles, have, as between themselves, an implied equitable lien upon the proceeds of the sale of their joint stock, to be applied in payment of the cost of the goods, and of the attendant expenses; and this implied lien exists not only on the moveable stock and effects, but on their joint landed estates, which, though in a strict sense real property, are yet commercial in their nature.

Extends to all joint adventures.

Nor is this right confined to general co-partnerships; but prevails, to an equal extent, in every joint adventure. Upon this principle, it is allowed, that if one partner becomes a bankrupt, his assignees can obtain no share of the partnership effects, until they first satisfy all that is due from him to the partnership (1). And though there may have been a qualified appropriation of a bankrupt partner's share, enabling him to take the apportioned goods, it is only such a vesting of the property, as may be divested on non-payment of his share of the partnership expenses. Neither does the removal of a part vary the right as to the residue, as in the following instance. A. B. and C., together with others, were part-owners of a ship, engaged in the whale fishery. The usual mode of managing the cargo was, that on the arrival of the vessel at her homeward port, the whalebone was taken into the possession of B., and sold by

Qualified appropriation to one partner insufficient to defeat lien.

Part removal does not divest lien on residue.

(1) Per Lord Tenterden, C. J., *Holderness* v. *Shackels*, 8 B. & C. 618; 3 M. & R. 25, *S. C.*

him, and the proceeds were applied towards the discharge of the expenses of the ship. The blubber was deposited in a warehouse, rented of C., by the owners of the ship, and the oil produced from it was then put into casks, each owner's share being weighed out, and placed separately in the warehouse, in casks marked with his initials. After the division, the practice was for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's-husband that the part-owner's share of the disbursements was not paid. In that case the warehouseman used to detain the oil till the ship's-husband's demand had been satisfied. The ship having arrived from her voyage in 1825, the above course was followed. The share weighed out and set apart for A. was twenty-nine tons, which was stowed in the warehouse in casks, which had A.'s initials put on them. In January, 1826, A. became bankrupt. Twenty tons of the oil had been delivered to A. before his bankruptcy; the remaining nine tons continued in the warehouse at the time of his bankruptcy. In the same month the warehouseman had orders from C., the ship's-husband, not to deliver to A. the remaining oil, as his share of the disbursements had not been paid; it was held, under these circumstances, in an action of trover, brought by the assignees of A. against C., for the residue of A.'s oil, that the other part-owners had originally a lien on it, for his share of the disbursements of the ship, and that this right was not divested by the separation of A.'s share from the residue, and placing it in casks marked with his name, or by the charge of rent to him for warehouse-room (1).

Interest of managing partner in a firm.

And where a lease of mines was taken by six persons, for the purpose of working them in partnership, and the managing partner, in the course of such management, became indebted to the concern, his interest in the part-

(1) *Holderness* v. *Shackels*, 8 B. & C. 612; 3 M. & R. 25, *S. C.*

nership was held to be applicable, in the first instance, to satisfy his debt to the concern (1).

Distinction between part-owners of ships and partners in general.

Part-owners of a ship differ, in respect of their interest *in the ship itself*, from partners in general; the former being tenants in common of their property, while partners in general are joint-tenants of their partnership stock (2).

With respect to the partnership *stock in the ship*, the rights of the owners vary in no degree from ordinary copartnerships, and there is no reason to doubt the existence of a lien on such stock, for their proportional advances (3). It was, indeed, held at one time, that even the ship itself, which forms the foundation of the partnership stock, was liable as partnership effects to pay any part of the disbursements and expenses to which any of the part-owners were liable, on account of the ship (4), but this decision was subsequently overruled (5).

Lien exists on stock brought in *lieu* of partnership property.

The lien which a partner is considered to possess upon the partnership effects is not confined to the stock brought in, but comprises every thing coming in *lieu* thereof, during the continuance, or after the determination, of the partnership (6). To illustrate the latter part of this position:—if the partnership between two persons be determined as to certain of their goods by an execution levied thereupon by the separate creditors of one partner, and the creditors trade with the goods, and out of the proceeds thereof, purchase other goods for

(1) *Fereday* v. *Wightwick*, 1 Russ. & Myl. 45; 1 Taml. 250, *S. C.*

(2) See Abbot on Ship.—A joint-tenancy may, of course, be created in a ship as well as any other chattel; but the operation of the registry act occasions this species of property to be generally conveyed to the owners in various and unequal shares, as tenants in common.

(3) *Doddington* v. *Hallet*, 1 Ves. J. 496; *Buxton* v. *Snee*, *ibid.* 239, 456.

(4) *Doddington* v. *Hallet*, *supra*.

(5) *Ex parte Young*, 2 Ves. & B. 242; *ex parte Harrison*, 2 Rose, 76.

(6) *West* v. *Skip*, 1 Ves. Sen. 242, per Lord Hardwicke.

the purposes of their trade, the lien of the solvent partner attaches on the newly-purchased goods (1).

Rule of equity as to partners.

"Equity," observes Mr. Smith in his "Mercantile Law"(2), "exercises a peculiar jurisdiction over the accounts of partners, and looks on the right of each in the joint stock as subject to the state of those accounts; so that, as between himself and his companions, his valuable interest may amount to little or nothing; nay, he may be indebted to the concern of which he is a member; for it is to be observed, that a partnership is held in equity so far distinct from the individuals composing it, that each of them may buy or borrow from the firm, and the firm from him, *vice versâ*; and although each partner, acting as such, can bind the joint stock by dealing with strangers in the name of the firm, yet he cannot do so by any act on his own individual account, to a larger extent than his own interest." Thus, though the goods may be taken, and his share therein sold, yet the purchaser from the sheriff buys only that to which the defendant is (as between himself and his companions) justly entitled (3), and the rule is the same, if he become individually bankrupt (4).

Equitable right depends on account between partners.

This equitable right of individual partners depending therefore upon the result of the accounts of the partnership firm, and being subject to the joint debts, it follows, that under a joint commission of bankruptcy, the separate estate of one has a lien on the other's share of a surplus of the joint estate, in respect of a debt proved under bills, drawn in the name of the firm for a separate debt, and may come in with the other separate creditors for the deficiency (5).

(1) Collyer on Partnership, p. 65; and see *Skipp* v. *Harwood*, 2 Swans. 586.

(2) p. 28, 2nd edit.

(3) *Heydon* v. *Heydon*, 3 Salk. 392; *Chapman* v. *Koops*, 3 Bos. & Pul. 289.

(4) *West* v. *Skip*, 1 Ves. Sen. 239.

(5) *Ex parte King*, 17 Ves. J. 115; 1 Rose, 212, *S. C.*

And where one only of a firm becomes bankrupt, and a dissolution of the partnership consequently follows, the assignees of the bankrupt partner become tenants in common of the partnership effects along with the solvent partner, and hold the bankrupt's undivided share, subject to the state of the partnership accounts (1).

Rights of assignees and of partner dependent on state of partnership accounts.

The rights of those claiming under an individual partner are also, as against the co-partnership effects, subject to the joint debts. The relation in which the claim arises, whether under a sale of the partner's interest—or under a gift or bequest—or by representation as the next of kin or executors—or under execution by a creditor—or commission of bankruptcy by assignees—makes no difference; for in all these cases the rule is equally applicable, that the party coming in the right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible nor made available, but under an account between the partnership and the partner; and it is an *item* in the account that enough must be left for the partnership debts (2).

Assignment by one partner of joint property subject to lien of partnership creditors.

Hence, an assignment by one partner of the joint co-partnership property, to secure his private debt, has been reasonably held to be subservient to the payment of the joint debts; for otherwise such partner would be able to withdraw, for the defrayment of his individual liabilities, the fund designed to meet the engagements of the partnership (3).

So, execution against one of several partners.

So, no lien can be acquired under an execution against the interests of an individual partner, for his private debt, detrimental to the creditors of the partnership; and accordingly, where an execution had been levied upon the joint property, and a bankruptcy followed, the

(1) *Holderness* v. *Shackels*, 8 B. & C. 612; *Smith* v. *Stokes*, 1 East, 363; *Smith* v. *Oriel*, *ibid.* 368.

(2) *Taylor* v. *Fields*, 4 Ves. J. 398, per Lord Mansfield.

(3) *Young* v. *Keithly*, 15 Ves. J. 557; *ibid.* note, page 559.

court, on a bill filed by the assignees, directed an account of the separate interest of the execution debtor in the partnership effects; and, on it appearing that there was no balance due to him, after satisfaction of the partnership debts, decided that the claim under the execution was invalid (1).

Joint creditors of a firm have its substituted rights in case of bankruptcy.

But, though the joint creditors of a firm are, in case of its insolvency, substituted in equity to its rights, and have consequently a title to earlier payment than any of the private creditors, they have not, technically speaking, a lien. Their right is, to follow the property as a trust fund (unless *bonâ fide* alienated) into the hands of others having an inferior title (2).

But a *bonâ fide* alienation may be effected between partners to defeat lien of joint creditors.

And inasmuch as no actual lien exists, either at law or in equity, a *bonâ fide* transmutation of the partnership property may be made on the dissolution or winding-up of a concern, so as to bind the joint creditors, and defeat their equity on the effects in *specie*, in the hands of a partner continuing to carry on the business. "It would be a monstrous proposition," observes Lord Eldon, "to say that effects which have belonged to a partnership shall, in all future time, remain part of the partnership effects, notwithstanding a *bonâ fide* act;" and hence it has been decided that, on a fair dissolution of partnership between two persons, one of whom has retired and assigned the joint property to the other, taking a bond for the value, and a covenant of indemnity against the debts, and the other has continued the trade separately for a year and a half, and then become bankrupt, the equity of the retired partner in the effects is gone, and therefore the joint creditors have no claim thereupon (3).

Joint creditors against partners on dissolution.

Neither have joint creditors, before execution, and prior to a dissolution of partnership, any lien upon the

(1) *Taylor* v. *Fields*, 4 Ves. J. 396.
(2) *Campbell* v. *Nuttall*, 2 Swans. 575; *West* v. *Skip*, 1 Ves. Sen. 239, 455.
(3) *Ex parte Ruffin*, 6 Ves. J. 119.

joint effects. They can only sue the partners and take execution, joint or several, as they may; but until execution, there is no process by which, as creditors, they can take the joint effects; and their equity after dissolution depends upon, and is worked through, the right of the partners (1).

Co-partners against each other on dissolution of partnership.

If, on the dissolution of a partnership, it be arranged that specific articles are to become the separate property of one partner, and the debts are to be paid out of a particular fund, which proves deficient, the other partner has no lien on the specific articles in respect of the deficiency; for having vested in his co-partner a separate title to, and interest in, that portion of the partnership property, he cannot set up a lien in direct breach of his agreement (2).

Assets of a deceased partner may be followed in equity if surviving partners become insolvent.

The injustice arising from the exoneration, at law, of the representatives of a deceased partner from the payment of his share of partnership liabilities, has been removed by the recognition of such debts, in equity, as several and subsisting, and therefore enforcible upon bill against his representatives, in case of the insolvency of the other partners. A creditor has therefore an absolute and unconditional right, where the surviving partners are bankrupt or insolvent, to resort at once to the assets of the deceased partner (3). Nor is he obliged, in the first instance, to proceed against the surviving partners, even though unable to show that full satisfaction cannot be obtained from them, but may leave the representatives of the deceased partner to their remedy against the survivors (4).

(1) *Ex parte Rowlandson*, 2 Ves. & B. 172; 1 Rose, 416, *S. C.*

(2) *Lingen* v. *Simpson*, 1 Sim. & S. 600.

(3) *Devaynes* v. *Noble*, 2 Russ. & Myl. 495; *Gray* v. *Chiswell*, 9 Ves. J. 118; *Vulliamy* v. *Noble*, 3 Mer. 593; *ex parte Kendall*, 17 Ves. J. 514; *Bishop* v. *Church*, 2 Ves. Sen. 371; *Sumner* v. *Powell*, 2 Mer. 30; *Holtscomb* v. *Rivers*, 1 Ch. Ca. 127; *Cowell* v. *Sikes*, 2 Russ. 191.

(4) *Wilkinson* v. *Henderson*, 1 Myl. & K. 589; *Stevenson* v. *Chiswell*, 3 Ves. J. 566.

Fund on which lien claimed must be joint and unappropriated.

The fund or stock, upon which the court has recognized the equity, or supported the interest of partners against each other, it must be observed, is that which continues joint and unappropriated.

When fund placed in banker's hands to separate account.

Where the managing owner of a ship, chartered by the East India Company, received the warrants for the freight, and paid them into a banker's *in his own name*, drawing cheques from time to time for various sums out of the fund, and applying part for the use of the ship, and part for private purposes, but treating it entirely as his own; it was held, that the other part-owners had no lien on the fund in the hands of the banker, nor any claim against the latter, as their debtor (1).

When stock, &c. consigned to a specific destination.

So where, in pursuance of an arrangement entered into between two persons for the supply of provisions to the navy, the one indorsed to the other a bill of lading of a cargo of provisions which he had shipped, for the purposes of the contract; it was held, that the latter was not entitled to a lien on the cargo for any debt due to him from his partner (2), for the cargo, having been consigned to a specific destination, could not be legally diverted to any other purpose.

Partnership in the purchase of real estate.

In the purchase of real estate by partners for partnership purposes, the general rule of survivorship, in the case of joint-tenancy, is regarded only in equity as investing in the survivor a trust estate for the benefit of the representatives of the deceased partner, of the share to which he was entitled (3), and the court will, if necessary, direct an inquiry before the master for the purpose of ascertaining the fact of partnership (4).

(1) *Ex parte Gribble*, 3 Deac. & Chit. 339, *dubit.* Sir John Cross; and see *Sims* v. *Brittain*, 4 B. & Ad. 375; 2 Nev. & Man. 594, *S. C.*

(2) *Smith* v. *Burridge*, 4 Taunt. 684.

(3) *Lyster* v. *Dolland*, 1 Ves. J. 431; *Elliot* v. *Brown*, 9 Ves. J. 597; *Lake* v. *Craddock*, 3 P. Wms. 158; *Morris* v. *Barrett*, 3 You. & J. 384.

(4) *Lyster* v. *Dolland*, *suprà*.

Repairs and alterations effected by one of several joint-purchasers of an estate.

If a number of persons make a joint-purchase of an estate, and one of them subsequently effects considerable repairs and alterations at his own cost and dies, the expenses attach as a lien on the property, and a trust is created for the representatives of him who incurred them (1). This principle has also been maintained in the case of joint lessees, where one of the tenants has renewed the lease, and the other has reaped the benefit of it; and the one advancing the money has been held to have a charge on the other moiety of the estate, for the moiety of his advances, on account of the fines; although such other moiety of the estate was in strict settlement at the time of the renewal, for it was considered that the case came within the limits and principles of the rule, where mortgagees who have renewed leasehold interests, have been deemed entitled to charge the amount upon the land (2).

Purchase money paid by one partner only.

But where two or more persons purchase an estate, and one pays all the money, and the estate is conveyed to them both, the one who paid the money cannot call upon those who paid no part of it, to repay him their shares of the purchase money, or to convey their shares of the estate to him. By payment of all the money, he gains neither lien nor a mortgage, because there is no contract for either; nor can it be construed as a resulting trust, as such a trust cannot arise at an after period; and perhaps the only remedy he has, is to file a bill against them for a contribution (3). Whenever, therefore, two persons agree to purchase an estate, it should

(1) *Lake* v. *Gibson*, 1 Eq. Ca. Abr. 290; pl. 3, per. M. R.

(2) *Hamilton* v. *Denny*, 1 Ball & B. 199.

(3) 3 Sug. Vend. 251, 10th ed. and note (*r*), in which the learned author refers to *Wood* v. *Birch*, and *Wood* v. *Norman*, Rolls, 7 & 8 March, 1804; the decree in which case does not, he remarks, authorise the observation, but he conceives it to follow from what fell from the Master of the Rolls, at the hearing.

be stipulated in the agreement, that if, by the default of either of them, the other shall be compelled to pay the whole, or the greater part of the purchase money, the estate shall be conveyed to him, and he shall hold the entirety against the other and his heirs, unless he or they shall, within a stated time, repay the sum advanced on their account, with interest in the meantime (1).

CHAPTER XIV.

ACCOMMODATION ACCEPTORS, AND INDORSEES OF BILLS OF EXCHANGE.

Acceptors of bills of exchange.

In considering the rights of accommodation acceptors, and indorsees of bills of exchange, in connexion with the subject of lien, and in pointing out the cases in which such parties are held to be entitled to protection, it may be premised as a general rule, that where there is an express contract for a particular mode of indemnity between the drawer and acceptor of a bill of exchange, the latter can resort to no remedy raised by legal implication (2). But in the absence of such arrangement, the law implies a contract of indemnity in his favour, and permits resort to detainer of the money, or goods, that may happen to be in his hands belonging to the drawer. Where, therefore, a person, having obtained possession of funds belonging to another, without fraud or misrepresentation, or being, in any manner, indebted to him, accepts bills for his accommodation, and the drawer afterwards commits an act of bankruptcy, or becomes insolvent, such acceptor, without any express authority,

Express contract for mode of indemnity defeats implied remedy.

Acceptor may otherwise retain funds or goods of drawer.

(1) 3 Sug. Vend. 251, 10th edit.

(2) *Toussaint* v. *Martinnant*, 2 Term Rep. 100.

has an equitable right to retain the funds, or withhold the debt, till the bills be delivered up to him, or he receive a sufficient bond of indemnity against being sued upon them (1).

Implied indemnity applicable only to *bonâ fide* accommodation acceptances.

This implied contract of indemnity is applicable only to those cases where the bills are really understood to have been accepted for the accommodation of the drawer. Where, therefore, a person drew a bill upon another, to whom he had been sending goods for sale, and obtained his acceptance, neither party knowing, at the time, the state of the accounts between them; and it turned out subsequently that the drawer was indebted to the acceptor, the court held, that a bill so drawn and accepted could not be treated as an accommodation bill, and that consequently there was no implied undertaking on the part of the drawer to indemnify the acceptor against any action that might be brought against him (2).

Indemnity of an accommodation indorser.

If a party indorse a bill for the accommodation of the drawer, which is also accepted by a third person for the like accommodation, such an accommodation indorser, in case there be reasonable ground to apprehend the insolvency of his principal, has an equitable right to withhold the payment of any money which he may owe to him, until he has been indemnified against any liability on account of his indorsement, though such liability would be no defence at law to an action by the principal (3).

Where money, &c. deposited expressly to indemnify.

With regard to the rights of acceptors, where money or goods are deposited for the particular purpose of indemnity, no doubt can be entertained, for they hold them under an express contract to that effect.

Accommodation acceptors

And where a sum of money has been lodged with a

(1) *Madden* v. *Kempster*, 1 Camp. 12.

(2) *Bagnall* v. *Andrews*, 7 Bing. 217.

(3) *Wilkins* v. *Casey*, 7 Term Rep. 711; *Willis* v. *Freeman*, 12 East, 659; *ex parte Metcalfe*, 11 Ves. J. 407; Chit. on Bills, p. 272.

entitled to lien on money, &c. in hand, notwithstanding statute of limitations.

party to indemnify him against bills of exchange, which he has accepted for the accommodation of another, an action will not lie against him to recover the money, while the bills are outstanding, even though the statute of limitations has run upon them (1). But where goods have been pledged expressly to secure, by the produce of sale, acceptors who have taken up and paid bills drawn on them by the owners, they are not subject to any further charge in respect of other bills taken up and paid subsequently, if the amount of the original sums paid on account of the owner have been repaid to them, without resorting to a sale (2).

Goods expressly pledged to secure particular acceptances, not liable to others.

Funds in hand, liable to full amount, though acceptor compound with creditors for a less sum.

The right of an acceptor to the funds deposited by way of indemnity, has been held binding to the entire amount of the bills against the principal, though the former may have compounded with the holders of the bills for a less sum. Thus, where an agent accepted bills of his principal to the amount of funds then in his hands, and the bills were negotiated to creditors who, without the knowledge of the principal, accepted from the agent a composition of 10*s.* in the pound, in order to relieve him from his responsibility, and in discharge of the acceptances which were returned to him, it was held, on the bankruptcy of the principal, that the agent could retain, as against the assignees, the full amount of the bills, out of the funds in his possession (3).

Indorsees have benefit of arrangement between drawer and acceptor, on bankruptcy of the latter;

If a party take bills for the price of goods, and it be agreed that the bills shall be paid out of the proceeds of the sale of them, the indorsees of the bills will be entitled, on the bankruptcy of the acceptors, to have the benefit of the arrangement, though without notice of it.

And may be paid out of proceeds of goods

A., having procured goods, which, by agreement with B. and C., were to be supplied on the joint adventure of

(1) *Morse* v. *Williams*, 3 Camp. 418.
(2) *Birdwood* v. *Raphael*, 5 Price, 593.
(3) *Stonehouse* v. *Read*, 3 B. & C. 669; 5 D. & R. 603, *S. C.*

the three, drew bills on the latter, for the amount of the cost of the goods, which they accepted, and A. engaged to renew the bills until the return proceeds for the goods were received. B. and C. managed the shipment, and directed the consignee to forward the account of the return sales to themselves. A. then applied to D. to discount two of these bills (D. having no knowledge that the bills were drawn on the joint account, and not being made acquainted with that circumstance till after the bankruptcy of A. and of B. and C.), and to induce him to do so, undertook that the proceeds of the goods should be applied in liquidation of the bills. All the parties subsequently became bankrupt, and part of the return proceeds came to the hands of the assignees of B. and C.; it was held, that the proceeds were clothed with a trust for the payment of the bills, and that the assignees of B. and C. were bound to pay over such proceeds to the assignees of D. (1).

directed to be sold for the purpose of liquidation;

So, securities held by a banker against his acceptances are available to the holders of bills, who, though directly having no lien upon them, have an equity to have them applied specifically to the discharge of the acceptances, upon this broad and general ground, that upon a transaction of this nature, a person holding the bills has a right to the benefit of any contract between the principal debtor and the party indemnified. It is the effect of an equity between the holders and the acceptors, rather than directly in their own right upon any fund in the hands of the latter; and the principle is equally applicable in favour of holders of bills against the assignees of the acceptor, in case of his bankruptcy (2).

Or out of securities held by acceptor;

And when the drawer of bills of exchange deposits

Or on short

(1) *Ex parte Prescott*, 1 Mon. & Ayr. 316, *dubit.* Sir J. Cross; 3 Deac. & Chit. 218, *S. C.; ex parte Copeland*, 3 Deac. & Chit. 199.

(2) *Ex parte Waring*, 19 Ves. J. 345; 2 Rose, 182; 2 G. & J. 404, *S. C.; ex parte Perfect, re Neville*, Mon. 25.

bills deposited with acceptor.

short bills with the acceptor, to cover his drawing account, and both drawer and acceptor become bankrupt, the holder of the acceptances can call upon the assignees of the acceptor, to apply the short bills in discharge of the acceptances, to the extent of the lien which the acceptor had upon them, at the time of his bankruptcy (1).

Right of acceptor in case of bankruptcy of drawer.

It was formerly held, where a party accepted bills for the accommodation of a trader, who, after committing a secret act of bankruptcy, but before the commission was sued out, lodged money with him to take up the bills which became due after the commission issued, and were then paid, that the money so lodged might be recovered by the assignees (2). So, in a later case, before the passing of the bankrupt act, 6 Geo. 4, c. 16, s. 50, where dealings between a trader and his factor continued after the former had committed an act of bankruptcy, and up to the time of the issuing of the commission; and the trader, after a secret act of bankruptcy, and within two months of the commission, lodged money with the factor, who was under accommodation acceptances for him; it was held, that the money could not be retained by the acceptor to indemnify him against his liability to take up the bills (3).

May set off bills, &c. against debts due from him.

But the law, in this respect, has been altered by the statute above referred to, which gives a right of set-off of mutual credits up to the time of the issuing of the commission, notwithstanding any prior act of bankruptcy; provided that the party claiming the benefit of any such set-off had not, when the credit was given, notice of any act of bankruptcy committed by such bankrupt. This section is an extension of nearly similar powers in the statutes 5 Geo. 2, c. 30, s. 28, and 46 Geo. 3, c. 135, s. 4

(1) *Ex parte Parr*, Buck, 191.
(2) *Tamplin* v. *Diggins*, 2 Camp. 312.
(3) *Kinder* v. *Butterworth*, 6 B. & C. 42; 9 D. & R. 47, *S. C.*

(now repealed), which rendered the balance of accounts between the parties the debt at law, to be proved by the creditor, or recovered by the assignees, provided that the person claiming the benefit had not only no notice of any act of bankruptcy, but also, no notice that the trader was insolvent, or had stopped payment.

Holder of bankers' notes allowed set-off against debt due to them, though he knew of their insolvency when he received them.

The holder of bankers' notes has, under this section of the first-mentioned statute, been allowed to set off the notes against a claim, by the assignees of the bankers, for the balance of an account due from him, although he knew, at the time he took the notes, that they had stopped payment, but was not aware of any act of bankruptcy (1). Notice of insolvency is therefore no longer an ingredient in the case to prevent the remedy of parties under liability on behalf of a bankrupt.

6 Geo. 4, c. 16.

The 52nd section of the 6 Geo. 4, c. 16, which, in terms, is similar to the 8th section of the repealed act 49 Geo. 3, c. 121, permits proof by sureties under the commission of bankruptcy, although the payments for which they may have been bound have been made after bankruptcy. Every person who has made himself legally liable for the payment of any debt, as the drawer, the acceptor, or even the indorser of an accommodation bill, is a surety within the meaning of the act (2).

The rights of persons who have accepted bills on the faith of goods consigned to them for the purpose of sale, are treated of, at considerable length, under the head "Factors and Brokers," and it is therefore unnecessary to dwell upon them further in this place.

(1) *Dickson* v. *Cass*, 1 B. & Ad. 343; *Hawkins* v. *Whitten*, 10 B. & C. 217; 5 M. & R. 219, *S. C.*

(2) *Bassett* v. *Dodgin*, 9 Bing. 653; *ex parte Yonge*, 3 Ves. & B. 40; *Stedman* v. *Martinnant*, 13 East, 427; *ex parte Lloyd*, 1 Rose, 4; *Vansandau* v. *Crosbie*, 3 B. & Ald. 13; *ex parte Lobbon*, 17 Ves. J. 334. But see *Yallop* v. *Ebers*, 1 B. & Ad. 698.

CHAPTER XV.

ATTORNEYS AND SOLICITORS.—CLERKS OF ASSIZE.—COMMISSIONERS FOR TAKING THE ACKNOWLEDGMENTS OF MARRIED WOMEN UNDER 3 & 4 W. 4, c. 74.—COMMISSIONERS FOR THE PARTITION OF ESTATES.—CERTIFICATED CONVEYANCERS.—TOWN CLERKS.—AGENTS IN TOWN.—CLERKS IN COURT.—SIX CLERKS.—CLERK OF ENROLMENTS IN BANKRUPTCY.

Attorneys and solicitors. Origin of right.

In the discussion of the law of lien, as applicable to attorneys and solicitors, and their agents in town, an attempt to trace its origin, or to establish the period of its introduction into practice, would be as useless, as it is unessential, to the purport of our present inquiry. It may suffice to observe, in the language of Lord Mansfield (1), that the recognition of the right of lien in their case is founded on principles of justice, and though perhaps of but comparatively modern origin, is now firmly established by numerous decisions both at law and in equity.

Lien extends to all deeds and papers in possession.

The general and settled principle is, that attorneys and solicitors of the different courts of law and equity have a lien for their costs upon all deeds, papers, and other documents of their clients, that come into their possession in their professional capacity, for the purposes of business, and though they may not come into their hands in the particular cause, or on the particular occasion, in which their demand arises (2).

Commensurate with right of client.

This right of general lien on the papers of clients is commensurate, of necessity, with that right only which the party delivering the papers to them has therein (3),

(1) *Wilkins* v. *Carmichael*, Doug. 100.
(2) *Stevenson* v. *Blakelock*, 1 M. & S. 535.
(3) *Hollis* v. *Claridge*, 4 Taunt. 807.

but, if an attorney be entitled, as against his client, to a lien upon papers in his possession, for business already done, the lien operates, on his client's bankruptcy, against his assignees, not only for such amount, but for the costs of an action commenced against the client, subsequently to the issuing of the commission, to recover the amount of the bill, unless it be shown that the action was improperly commenced for the purpose of increasing costs (1).

Available against assignees of a bankrupt client.

Nor can the official assignee under the 1 & 2 W. 4, c. 56, s. 22, take a bankrupt's money out of the hands of a solicitor, without discharging his lien (2).

And against official assignee.

Such lien against assignees is as effectual under the implied agreement as against the bankrupt himself (3), but an attorney has not a right of lien against the general creditors of two bankrupts, if prosecuting a separate fiat against one only (4). And it has been held, that if an uncertificated bankrupt sue for an account, which, on reference to arbitration, is found to be due to him, the attorney's lien for costs is paramount to the claim of the assignees, to the amount awarded, though the residue belongs to them (5).

As effectual against assignees as against bankrupt client.

But, though the solicitor is entitled to the custody of all the papers and proceedings under a fiat in bankruptcy, he has nevertheless no lien upon them for his costs (6). Nor has he any lien as against the assignees upon the papers of his client that come to his hands after the bankruptcy of the latter (7), and if he refuse to deliver

But no lien on proceedings under fiat in bankruptcy.

Nor on papers that come to him after client's bankruptcy.

(1) *Lambert* v. *Buckmaster*, 2 B. & C. 616; 4 D. & R. 125, *S. C.*

(2) *Ex parte Bowden*, 2 Deac. & Chit. 182.

(3) *Ex parte Bush*, 7 Vin. 74; *Lambert* v. *Buckmaster*, 2 B. & C. 616; 4 D. & R. 125, *S. C.*; *Brown* v. *Heathcote*, 1 Atk. 160.

(4) *Ex parte Lee*, 2 Ves. J. 285.

(5) *Jones* v. *Turnbull*, 5 Dowl. P. C. 591.

(6) *Ex parte Shaw*, 1 Glyn & J. 124; *ex parte Hardy*, 1 Rose, 395; *ex parte Newton*, 2 Rose, 19.

(7) *Ex parte Lee*, 2 Ves. J. 285; and see *ex parte Allison*, 1 Glyn & J. 210.

them up, he will be liable to the costs of a petition to compel him (1).

But may have against bankrupt client, on deed of composition.

Notwithstanding, however, that he has no lien on the proceedings against the assignees, he may possess one, as against a bankrupt, on a deed of composition to supersede the fiat (2).

How far lien attaches on the will of a client.

It has been doubted whether an attorney's right of lien extends to the will of his client, and the question was not before the court till the case of *Georges* v. *Georges* (3), where the Lord Chancellor intimated a strong opinion to the contrary, and ordered the production of it for the purpose of establishing the character of all persons claiming thereunder, without prejudice to any application the solicitor might be advised to make; and in a case subsequently decided, his Lordship said, that he would not establish such a doctrine, that consent for production was necessary, with respect to a will, an instrument which may be altered, even *in articulo mortis*, and on which a solicitor can have no lien (4). And where a solicitor retained as a lien, a will which he had prepared, and was cited by the prerogative court, at the instance of the personal representatives, to bring in the will, and leave it in the registry of the court, administration was nevertheless granted to the widow of the testator, a silk merchant, limited to the sale of silks, which would deteriorate in value if they remained unsold, and to bring actions and dispose of the stock (5). And when subsequently an application was made to the Court of King's Bench, for a rule to show cause why a writ, in the nature of a writ of prohibition, should not issue to the judge

(1) *Ex parte Hudson*, 2 Deac. & Chit. 507.

(2) *Ex parte Buller*, 1 Rose, 134.

(3) 18 Ves. Jun. 296; Coram Eldon, Ld. Chan.

(4) *Balch* v. *Symes*, 1 Tur. & Russ. 87; and see *Lord* v. *Wormleighton*, Jac. 580; and *ex parte Crisp*, 2 Dowl. P. C. 455.

(5) Chit. Gen. Pr. vol. 2, p. 505, and note (*m*); and see Wms. on Executors, vol. 1, p. 203, 2nd edit.

of the Prerogative Court of Canterbury, commanding him to stay all proceedings against the attorney, until the lien on the will should have been satisfied or discharged, on the ground that the lien claimed was a matter of common law, the court discharged the rule, because the spiritual court had, at all events, jurisdiction to order the will to be brought in, and the Court of King's Bench would not assume that the Prerogative Court were going to act in derogation of the course of common law, by trying the right of lien (1).

Solicitor has a precedent claim in the administration of assets.

In the administration of assets, it would seem, however, that a solicitor has a precedent claim, by way of lien, on the duty which may come to his hands, over all the specialty creditors of the testator; and that he may insist upon its previous application in discharge of his claim for trouble and moneys disbursed (2).

Lien must be claimed in the character of attorney or solicitor.

As before remarked, the claim to lien must be in respect of the party's character of attorney or solicitor. Thus, though he has a lien upon all papers delivered to him in that character, not only for professional business, in the matter of the papers, but for all professional business, whilst they remain in his hands, he has no lien, as solicitor, on papers which he receives as steward (3). Nor can he claim, unless by special agreement, for debts due to him in any other than his professional character, as for loans of money (4). So, it has been decided, that a solicitor, who obtains possession of papers, as *prochein amy* of a party, has no lien on them, by virtue of such possession (5).

Cannot claim papers in his possession, as steward;

Or as *prochein amy*.

The lien of an attorney, it has been observed, is co-

Lien co-exten-

(1) *Ex parte Law*, 2 Ad. & Ell. 45; 2 D. P. C. 528, *S. C.*

(2) *Turwin* v. *Gibson*, 3 Atk. 720.

(3) *Champernown* v. *Scott*, 6 Mad. 93.

(4) *Worrall* v. *Johnson*, 2 Jac. & W. 218.

(5) Mr. Montagu, in his "Summary of the Law of Lien," p. 53, observes, that the Chancellor decided this point (March 12, 1810), but he could not learn the name.

sive only with client's right, and cannot affect the rights of a third party.

extensive only with the rights of his client; and it cannot, therefore, affect the rights of a third party (1). Thus, where a plaintiff, who had contracted to purchase an estate from the client of an attorney, and had the deeds prepared at his own expense, and sent to the client for execution. The client executed, and gave them to a servant to be sent back. The servant, however, delivered them to the defendant, who was an attorney, and had a demand against his client for professional business. No directions were given to the defendant to retain the deeds till payment of the purchase money. Some of the necessary parties refused to execute the deeds, and the plaintiff having abandoned the contract, demanded the deeds from the defendant, who refused to deliver them up, claiming to have a lien for his demand against his client; it was held, in trover, for the deeds, described as such, and also as stamped pieces of parchment, that the plaintiff was entitled to recover the deeds, in their cancelled, if not in their uncancelled state (2); and that, consequently, no lien attached for the debt due from his client.

Against trustees in their fiduciary character.

Neither can trustees under a will, in their fiduciary character, invest an attorney with a right of lien, inconsistent with the continuance of their trust. And where, under the limitation of an estate to trustees, upon trust to pay part of the rents and profits to testator's widow, and the residue towards the maintenance and education

(1) *Symons* v. *Blake*, 2 Cr. M. & R. 416; 1 Gale, 182, *S. C.*

(2) *Oxenham* v. *Esdaile*, 2 You. & J. 493; *Esdaile* v. *Oxenham*, 3 B. & C. 225; 5 D. & R. 49, *S. C.* This decision depended upon the instrument having been imperfectly executed, and upon the sellers not interposing to claim any interest in it; and the contract having been rescinded, what might have been a deed, was treated as a spoiled parchment. The court, in this view, it appears, made an order in substance that the deed should be delivered to the purchaser; giving to the sellers the right to cancel it, but cancelled or uncancelled, it was to be delivered to the purchaser. See Sugd. Vend. vol. 2, p. 440, 10th ed.

of his son, till twenty-one, and after that time to him for the life of the widow, and on her death to him in fee; the trustees employed an attorney to defend certain actions and suits, in carrying into effect the trusts of the devise, and thereby incurred a debt for costs, for which they deposited the title-deeds of the premises; it was held, that no lien attached against the son, after the death of the mother (1).

Against mortgagor on redemption for costs due from mortgagee.

But the deeds of a mortgagee may be retained against a mortgagor, for the costs due to an attorney from the former, notwithstanding the proviso for redemption, on payment of the principal and interest, for such pledge by the mortgagee is co-extensive only with his own right, and the mortgagor, on re-payment, should first assure himself of the non-existence of such incumbrance.

Mortgagors on repayment, and purchasers on paying purchase money, should inquire.

The necessity for such inquiry is equally obvious in the case of parties purchasing, subject to the mortgage. Thus, where A. purchased premises which were, at the time, in mortgage to B., with a proviso for reconveyance, at the costs of the mortgagor, on payment of principal and interest, and re-sold them, with an agreement to pay off the mortgage, on completion of the purchase, but B.'s attorney, who held the title-deeds, refused to deliver them to A. till payment of his own bill, containing items fairly chargeable on the occasion, as costs due from the mortgagor, and others, which were properly chargeable against the mortgagee; it was held, that the attorney might enforce his lien on the deeds against A., to the whole extent of the bill, and that A., having been obliged to pay it, for the purpose of releasing the deeds, could not recover back from the attorney any amount unduly charged (2).

No lien against intended mortgagee for mort-

But an attorney, acting on behalf of an intended mortgagee, has no lien against the intended mortgagor, for

(1) *Lightfoot* v. *Keane*, 1 Mee. & W. 745; 2 Gale, 138, *S. C.*

(2) *Ogle* v. *Storey*, 4 B. & Ad. 735; 1 Nev. & M. 474, *S. C.*

gage not completed.

the costs of investigating the mortgage, upon deeds delivered by the proposed mortgagor to the mortgagee, and by him to the attorney (1); even though, by custom, the expenses are payable by the mortgagor, for there is no privity between him and the attorney.

Has a lien on an estate recovered in equity, but not in the hands of the heir.

A solicitor, prosecuting a suit in Chancery to a decree, has a lien on the estate, in the hands of the person recovering; but not in the hands of the heir (2).

So, on the estate of a lunatic for bills generally.

So, if he has been engaged as the solicitor for a lunatic in various suits, he has a lien on the lunatic's estate for his bills generally (3).

And for costs in obtaining commission of lunacy.

And the like lien exists upon the estate for costs incurred in obtaining the commission of lunacy. Thus, where under such circumstances, a petition was presented by the solicitor to the court to have his costs paid out of the fund of the lunatic's estate, and not to be obliged to prove for them under a commission of bankruptcy against the person who sued out the commission of lunacy, the Lord Chancellor observed, "Solicitors have this equity allowed to them to be entitled to a satisfaction out of the fund, for their expenses, whether in the way of suit, or prosecution in lunacy or bankruptcy" (4).

Against an executrix being also an annuitant under the will.

If an executrix be indebted to the testator's estate, and entitled, under the will, to an annuity, her solicitor has a lien for his costs upon any payment of the annuity to which she may be entitled, after discharging the debt due from her to the estate (5).

Papers deposited for special purposes cannot be detained

Consistent with the general rule in these cases, papers deposited for a specific purpose are not liable to the solicitor's claim of lien (6). But if, after the particular

(1) *Pratt* v. *Vizard*, 5 B. & Ad. 808; 2 Nev. & M. 455.
(2) *Barnesley* v. *Powell*, Amb. 102.
(3) *Barnesley* v. *Powell*, *supra*.
(4) *Ex parte Price*, 2 Ves. Sen. 407.
(5) *Skinner* v. *Sweet*, 3 Mad. 244.
(6) *Balch* v. *Symes*, 1 Tur. & Russ. 87; *Lawson* v. *Dickenson*, 8 Mod. Rep. 307; *ex parte Fleming*, 16 Ves. J. 258.

purpose fails, as where deeds are deposited for the purpose of raising money, and the object is not accomplished, and the client permits them to remain in the hands of the attorney, it will be deemed equivalent to a general deposit (1). Where the plaintiff had an estate mortgaged to him, and the defendant, who was an attorney, and who drew the mortgage, by that means got all the deeds relating to the title into his possession, and refused to deliver them to the plaintiff, unless the mortgagor would pay a debt which the defendant pretended to be due from him: upon a motion for a rule to deliver up the deeds to the plaintiff upon payment of what was due for drawing and engrossing the mortgage, the court was of opinion, that though an attorney might detain papers until the money be paid for drawing them, he cannot detain any writings which are delivered to him upon a special trust, even for the money due to him in that very business; and a rule was accordingly made for delivering up the deeds (2). by way of lien for general charges.

But where a client gave his attorney a specific sum for the purpose of satisfying a debt due to B., for which an execution had issued against his goods, and the attorney paid the money to B., who thereupon delivered to him a lease which had been deposited by the client with B., as security for the debt; it was held, that the attorney had a lien on it for his general balance due from the client, for it was incident to his duty to receive back the lease which had been so pledged (3). But *contra*, if incidental to duty to receive them.

If the intention be to deposit deeds or papers for a particular purpose, and that they shall not be subject to the general lien, such deposit ought to be accompanied by special agreement (4). If papers are not to be subject to lien, there must be special agreement.

(1) *Ex parte Pemberton*, 18 Ves. J. 282.

(2) *Lawson* v. *Dickenson*, 8 Mod. Rep. 307; but see *ex parte Stirling*, 16 Ves. J. 258.

(3) *Stevenson* v. *Blakelock*, 1 M. & S. 535.

(4) *Ex parte Stirling*, 16 Ves. J. 258.

Withholding deeds under supposed right of lien.

If an attorney withhold the deeds of his client on the ground of a supposed right of lien, which is proved to have no existence, it follows of course, that he can maintain no lien upon them, for the expenses incurred by him, in consequence of applications made for the delivery (1).

Having now considered on what documents, in what capacity, and from whom, an attorney may claim the right of lien, I shall proceed next to point out the power and security he possesses over the judgments in favour of his clients, and of the funds paid into court on their behalf.

In equity: 1st, on funds recovered.

2nd. On papers in his hands.

There are two kinds of lien which a solicitor has been held to be entitled to in equity, for his costs. First, on the funds recovered; and secondly, on the papers in his hands. If there be no fund, and no cause, still the client cannot get back the papers without paying what is due, not only in respect of the business for which the papers have been used, but for all other business. This general right of lien antecedently possessed, in respect of the papers themselves, follows the fund recovered, which is, in fact, the fruit of the papers. On the fund itself his lien does not extend to general debts, but to those only due to him in his character of solicitor under the suit. For these he has a right to detain; but it is the general practice in equity for the client, when he applies for an order for the delivery of his papers, to submit to pay the bill of costs generally (2). It is therefore only when he has in his possession the instrument on which his client's title or right to the fund rests, that he gains a right of general lien on the fund itself; subject to this exception, his lien on the fund recovered in the cause is for the costs of the particular cause only (3).

On papers for costs generally, but on funds for the costs of the cause only.

Except when holding client's title to the fund.

Lien on fund no bar to con-

And having this lien on the fund in court, to the extent

(1) *Re Sharpe*, 1 Dowl. P. C. 432.
(2) *Worrall* v. *Johnson*, 2 Jac. & W. 218.
(3) *Lann* v. *Church*, 4 Mad. 391.

of his costs, he is not thereby debarred from taking other proceedings for the recovery of them; nor is the lien discharged, though he issue an attachment against his client, and commit him to gaol for non-payment of his bill. In such case, the satisfaction of the lien operates as a discharge of the attachment *pro tanto* (1).

current proceedings.

Satisfaction of lien is a discharge *pro tanto*.

But to entitle a solicitor to his lien on a fund in court, he must have proceeded in, and carried the business to a hearing, for if he do not so, whatever may be his reasons for declining to prosecute the cause, his lien will not be enforced (2).

Must carry cause to hearing, or lien will not be enforced.

Where there is a fund in court, a solicitor may avail himself of his lien upon it, without waiting the result of proceedings to compel payment of the costs by the opposite party (3). In a late case, a fund in court was decreed to the assignees of a defendant, who had become bankrupt during the progress of the cause, and certain costs were ordered to be paid to the defendant by the plaintiff. The defendant's solicitor, alleging that the plaintiff was insolvent, petitioned for immediate payment out of the fund in court, which was ordered (on appeal) by the Lord Chancellor (4).

Having lien on fund, need not wait payment of costs by opposite party.

In bankruptcy also, an attorney is entitled, on petition, to have a fund in court paid to him, in part discharge of his bill of costs at law, and in bankruptcy, relative to the claim under which the money was paid into court, although his client, since the fund was paid into court, has become insolvent; for the assignees of an insolvent debtor can only take his property, subject to the claims against him (5). So, he has a lien upon costs ordered to be paid to his client, upon a petition in bankruptcy, although there be no fund in court; nor can the client release the

In bankruptcy court, entitled to fund in court;

And to costs ordered to be paid to client.

(1) *Davies* v. *Bush*, 1 Younge, 358.
(2) *Cresswell* v. *Byron*, 14 Ves. J. 271.
(3) *Staines* v. *Maddon*, Mon. 319.
(4) *Pounsett* v. *Humphreys*, 1 C. P. Coop. Eq. Ca. 142.
(5) *Ex parte Moule*, 5 Mad. 462.

benefit of the order to the prejudice of the solicitor (1). And though a fiat in bankruptcy issue against his client before the costs are taxed, the lien of the solicitor still attaches (2).

Order in bankruptcy to pay money to client, not meant to deprive attorney of lien.

If the order be made in bankruptcy directing costs to be paid to the petitioner personally, it is not meant, nor can it have the effect, to deprive the solicitor of his lien for costs. "I do not wish," observed the Vice-Chancellor in a case of this description, "to relax the doctrine as to lien, which is to the advantage of clients, as well as solicitors; for business is often transacted by solicitors for needy clients, merely on the prospect of having their costs, under the doctrine as to lien" (3).

Court will prevent clients from receiving money recovered till attorneys' bills paid.

The courts both of law and equity have in many other instances, besides those enumerated, extended their protection to attorneys and solicitors, and granted orders for the prevention of their clients from receiving money recovered in suits in which they have been employed, until their bills have been paid (4).

Attorneys possess also a lien upon the judgments recovered by their clients.

And, not only are the funds in court available in discharge of the attorneys' claim against their clients, but also the judgments in their favour, and the costs payable to them in the causes, and on the issues, wherein they have succeeded.

Lien attaches on costs in the particular cause.

This lien of an attorney upon judgments recovered by his client, has been distinctly defined to attach only upon the balance of the costs accruing in the same cause, and which is ultimately to be paid over by one or other party.

Not on interlocutory costs.

The cause is not to be split, so as to give the attorney of

(1) *Ex parte Bryant*, 1 Mad. 49; 2 Rose, 237, *S. C.*

(2) *Ex parte Castle*, 15 Ves. J. 542.

(3) *Ex parte Bryant*, 1 Mad. 49; 2 Rose, 237, *S. C.*

(4) *Wilkins* v. *Carmichael*, Doug. 104; *Welsh* v. *Hole*, Doug. 226. In this case Sir J. Burrows mentioned to the court that the first instance of such an order was in the case of one Taylor of Evesham, about the time of a contested election for that borough. And Lord Mansfield said, that he himself had argued the question in the Court of Chancery.

either party a lien upon interlocutory costs, although ultimately his client may be bound to pay costs to a greater amount (1). Yet a distinction has been properly taken between interlocutory costs, the payment of which is not made a condition precedent to ulterior proceedings, and which may be set off against the final costs in the cause (2), and those, the payment of which constitutes a primary obligation, before further proceedings are allowed. Thus, where a defendant, by a judge's order, was allowed to go to trial upon terms of payment to the plaintiff of a sum of money and costs incurred up to the date of the order, but recovered a verdict, without previously complying with the terms of the order, it was held, that he was bound to pay the interlocutory costs, and could not set them off against those afterwards taxed for him upon the postea (3). As, therefore, the plaintiff's attorney might have had the costs paid before the cause was tried, he was entitled to have them on verdict, without allowing the costs payable to the defendant to be deducted. The costs, it may be remarked, had not in this case been actually incurred, and this distinction was pointed out and acted upon subsequently, in a case where a defendant was permitted to set off the taxed costs of the day against the costs of the rule for a new trial (4).

Except when not payable as a condition precedent to ulterior proceedings.

Interlocutory costs are now, by the general rules of Hilary Term, 2 W. 4, permitted to be deducted from the costs in the same suit, awarded to the adverse party (5). If, therefore, a plaintiff has recovered final judgment, and is liable to interlocutory costs in the suit, the plain-

Interlocutory costs now deducted by Reg. Gen. Hilary Term, 2 W. 4.

(1) *Howell* v. *Harding*, 8 East, 362: *Doe d. Dangerfield* v. *Allsop*, 9 B. & C. 760.

(2) *Doe d. Hope* v. *Carter*, 8 Bing. 330.

(3) *Aspinall* v. *Stamp*, 3 B. & C. 108; 4 D & R. 716, *S. C.*; *Smedley* v. *Philpot*, 3 Mee. & W. 573.

(4) *Doe d. Dangerfield* v. *Allsop*, 9 B. & C. 760.

(5) Reg. Gen. Hil. T. 2 W. 4. r. 93.

tiff's attorney's lien extends only to the balance payable to the plaintiff (1).

Clients must have an actual right to judgment, to entitle attorney to lien.

This salutary and expedient interposition of the courts, in support of the lien of an attorney, depends necessarily on the actual right of his client to judgment. When he has a *bonâ fide* title to it, against the opposite party, the court permits the attorney to carry on the suit for his own benefit, even where the client declines to do so himself; but where there is no collusion, and the client, either by his own act, or by the act of law, is deprived of the further means of enforcing his claim, the lien of the attorney equally ceases. If, therefore, a defendant be entitled to be relieved from a verdict obtained against him, the court will not abstain from interfering, on the ground of the lien of the plaintiff's attorney, upon the verdict for his costs (2).

Attorney may carry on suit when client declines to do so.

If defendant entitled to be relieved from verdict, lien of plaintiff's attorney no bar;

But lien extends to money levied by sheriff on execution by client, though notice that court would be moved to set aside *fi. fa.*

But it has been held, that the lien of an attorney, for his bill of costs, extends to money levied by the sheriff, under an execution, on a judgment recovered by his client, and he is entitled to have it paid over to him, notwithstanding the sheriff may have received notice from the party against whom the execution has been issued, to retain the money in his hands; and that the court would be moved to set aside the judgment for irregularity; and even though a docket has been struck against the client who has become bankrupt (3).

Or, though docket struck against client.

No lien on the body of a defendant.

But, though an attorney has a lien for his costs, and the court will assist him to make the subject-matter recovered by the judgment available for that purpose, it will not sanction a lien on the body of a defendant.

Notice of lien to sheriff having defendant under *ca. sa.* not binding.

It follows, therefore, that the mere assertion of an attorney, that he has a lien for his costs, and notice to that effect to the sheriff having a party in custody, is

(1) *Holliday* v. *Lawes*, 3 Bing. N. C. 774; 3 Hodges, 130, *S. C.*
(2) *Symons* v. *Blake*, 2 Cr. M. & R. 416; 1 Gale, 182, *S. C.*
(3) *Griffin* v. *Eyles*, 1 H. Bl. 122.

not a sufficient authority to the sheriff to detain him after payment of the debt to the plaintiff, and the authority of the latter for the defendant's discharge (1). A contrary decision, as observed *arguendo*, would have had the effect of extending the lien of an attorney to the person of the defendant. And where a plaintiff, who had recovered judgment against a defendant, charged him in execution, and died several years afterwards, and administration of his effects was granted to the defendant's wife; the court ordered the defendant to be discharged out of custody, without satisfaction of the costs of the attorney, who claimed a lien upon the judgment (2). Nor will the court refuse to discharge a defendant out of custody, where the plaintiff, after judgment recovered, has settled the action with the defendant, and by a new attorney caused satisfaction to be entered on the record, however much it may disapprove of the conduct of the new attorney, who must have known that the former attorney of the plaintiff had a lien for the costs on the judgment recovered (3).

Defendant released from custody after plaintiff's death, without regard to attorney's lien for costs;

Or after satisfaction entered on record by plaintiff.

In allowing parties to a suit to set off one judgment against another, the rights of attorneys, in respect of their lien for costs, have been variously regarded in the different courts.

When one judgment is set off against another, attorney's lien is regarded.

The Court of King's Bench has, in this respect, been uniform in its decisions.

Court of King's Bench

Thus, where a bill in equity was dismissed with costs, and the plaintiff brought an action for the same cause, in the Court of King's Bench, and recovered a verdict, the costs in equity were allowed to be set off, by the defendant, against the judgment; but subject first to the lien of the plaintiff's attorney, for his costs (4).

Such costs were, however, only costs in the particular

Only allow

(1) *Martin* v. *Francis*, 2 B. & Ald. 402; 1 Chitty, 241, *S. C.*

(2) *Pyne* v. *Erle*, 8 Term Rep. 407.

(3) *Marr* v. *Smith*, 4 B. & Ald. 466.

(4) *Harrison* v. *Bainbridge*, 2 B. & C. 800; 4 D. & R. 363, *S. C.* *Glaiste* v. *Hewer*, 8 Term Rep. 69.

In respect of the particular cause.

cause, for in a subsequent case (1), where an application was made to set off the costs and damages in one action against those recovered in a cross action, Abbott, C. J., took occasion to explain the judgment he had given in the case referred to above, and in which some of the reports had inaccurately attributed to him the expression that an attorney was entitled to a claim of *general* lien. "I think it sufficient," his lordship observes, "to answer all the purposes of justice, to lay it down as a rule, that when a party seeks to set off judgments in different actions, the attorney shall have a lien for his costs in the particular cause only; and I think that this is the only lien which an attorney is, by law, entitled to insist upon." So, the lien of the plaintiff's attorney upon the debt and costs recovered in the cause, after affirmance upon writ of error, must have been satisfied before the defendant was entitled to set them off against a judgment recovered by him against the plaintiff in another action (2).

After affirmance upon writ of error.

This court has, in fact, always extended the fullest protection over the attorney, and compelled satisfaction of his bill before an adverse party, against whom a judgment had been obtained, would be allowed to get rid of it (3).

Practice of the Court of Common Pleas.

However reasonable and just might have been the maintenance of this unrestricted right of lien (4), warranted too, as we have seen, by the settled practice of the Court of King's Bench, the doctrine has, at all times, been repudiated by the Court of Common Pleas (5). In

(1) *Stephens* v. *Weston*, 3 B. & C. 535; 5 D. & R. 399, *S. C.*

(2) *Middleton* v. *Hill*, 1 M. & S. 239.

(3) *Mitchell* v. *Oldfield*, 4 Term Rep. 123; *Vansandau* v. *Burt*, 1 D. & R. 168; *Morland* v. *Hammersley*, 2 H. Bl. 441 (*n*); *Randle* v. *Fuller*, 6 Term Rep. 456.

(4) Per Lord Kenyon, *Randle* v. *Fuller*, 6 Term Rep. 456.

(5) *Thrustout d. Barnes* v. *Crafter*, 2 Bl. Rep. 826; *Nunez* v. *Nogliani*, 1 H. Bl. 217; *Dennie* v. *Elliot*, 2 H. Bl. 587; *Emdin* v. *Darley*, 1 New Rep. 22; *Webber* v. *Nicholas*, 4 Bing. 16; and cases cited *post*.

this court, an attorney was always held to have only a lien, subject to the equitable claim against his client; that is, that the right, between party and party, was paramount to the rights between one of the parties and the attorney. The conflicting practice of the court, in this respect, incurred the just reprobation of Lord Eldon, then Chief Justice of the Common Pleas, who observed, "that he found it to be the settled practice, with much surprise, since it stood in direct contradiction to the practice of every other court, as well as to the principles of justice;" and his lordship suggested the consideration of the practice of the King's Bench, with a view to its future adoption in that court (1). Notwithstanding this observation, the practice continued to be still adhered to; for "whether," observed Lord Mansfield, in a later case, "the rule established in this court be a right one, is a matter for future consideration; but while the rule stands, we ought not to take away the right of the party" (2). Upon the reference, therefore, of a cause in the Common Pleas, where an award was made of a sum to be paid by each party, and the one entitled to the larger sum, sued in the King's Bench, in order to make the defendant's set-off subject to the lien of his attorney for his costs, the former court would not interfere to enforce the set-off. Nor would they order the award to be given up (3).

The attorney's lien has, in fact, been entirely disregarded, when looking at the equitable rights of parties; and this rule has been so rigidly abided by, that the court has ordered costs against an attorney refusing to allow the set-off (4); and one judgment has been deducted

(1) *Hall* v. *Ody*, 2 Bos. & Pul. 28.
(2) *Figes* v. *Adams*, 4 Taunt. 632.
(3) *Symonds* v. *Mills*, 8 Taunt. 526.
(4) *Bridges* v. *Smith*, 8 Bing. 33; 1 M. & Scott, 93, *S. C.*

from another, without regard to the attorney's lien (1). So, where a party, from whom rent was due, had obtained a verdict on a variance, and had become insolvent, the court permitted the avowant to amend and to pay the costs of the former trial into court, as a fund for payment of his rent, in derogation of the lien of the plaintiff's attorney (2).

Practice of the Court of Exchequer.

The practice of the Court of Exchequer has, in this respect, been by no means uniform (3). But, where a plaintiff had commenced two actions (trespass and detinue), arising out of the same transaction, for trifling causes, in one of which he obtained a verdict for 40*s*., and in the other a verdict was found for the defendant; the court, on motion by the defendant, founded on affidavits stating the object, nature, and result of the actions, and facts, impeaching the plaintiff, and stating that he was not to be found, ordered that the costs incurred by the defendant in the action wherein he was successful should be set off against those of the suit in which he had failed, notwithstanding the lien of the plaintiff's attorney, who opposed his claim to a general lien for costs (4). This judgment, it may, however, be observed, proceeded upon the special and peculiar circumstances of the case, and it is expressly mentioned, that the principle and conflicting authorities on the subject of lien were not then necessary to be decided upon. In fact, Mr. Baron Hullock, admitting the discrepancy in the cases in the two Courts of Common Pleas and King's Bench, considered himself at liberty to adopt either course as the best guide to an equitable decision, and that the court should not be

(1) *Vaughan* v. *Davies*, 2 H. Bl. 440; *Brown* v. *Sayce*, 4 Taunt. 320; *Schoole* v. *Noble*, 1 H. Bl. 23, *notis*; *Lomas* v. *Mellor*, 5 Moore, 95.

(2) *Brown* v. *Sayce*, *suprà*.

(3) See *Gifford* v. *Gifford*, Forrest, 110; *Smith* v. *Brocklesby*, 1 Anstr. 61; *Murphy* v. *Cunningham*, *ib*. 271; *Gabbot* v. *Chaytor*, *ib*. 279.

(4) *Lane* v. *Pearce*, 12 Price, 742.

bound or biassed by the practice of either one or other of those courts. It would not seem, therefore, by this case, that the court felt that the question was by any means settled.

In the courts of equity, the costs between the parties are arranged according to their several equities, and the solicitor's lien is only on the balance under that arrangement (1). "The Court of King's Bench," observed Lord Eldon, "have held the doctrine that equity shall not interfere with the lien: the Court of Common Pleas, on the contrary, hold that there can be no lien which will interfere with the equity between the parties; and my opinion is, that the practice of this court does not interpose the lien, farther than upon the clear balance which is the result of the equity between the parties" (2).

In the courts of equity solicitor's lien is on balance only.

This want of uniformity in the several courts has now been removed, so far as respects the Courts of Queen's Bench, Common Pleas, and Exchequer, by the rules promulgated by the judges in Hilary Term, 1832. It is thereby ordered, "that no set-off of damages or costs between parties, shall be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted" (3).

Practice of the courts of common law now rendered uniform.

The costs here referred to, are such as are taxed between attorney and client, and do not extend beyond the particular cause (4); and the rule is applicable only to cases where there is a cross claim for costs in separate actions. But it does not prohibit the setting-off of mutual claims for costs, between the parties in the same suit;

Costs referred to do not extend beyond the particular cause.

(1) *Taylor* v. *Popham*, and *Monke* v. *Taylor*, 15 Ves. J. 72; *Bawtree* v. *Watson*, 2 Keen, 713.

(2) *Ex parte Rhodes*, 15 Ves. J. 539. See, however, a contrary opinion expressed by his lordship in *Hall* v. *Ody*, 2 Bos. & Pul. 28.

(3) *Regulæ generales*, Hil. T. 2 W. 4; 3 B. & Ad. 388.

(4) *Watson* v. *Maskell*, 1 Bing. N. C. 366; 1 Scott, 658, *S. C.*; 1 Hodges, 73, *S. C.*

But one defendant succeeding may set off his costs against the damages, &c. recovered against a co-defendant.

and where, on the trial of an action of trespass, a verdict was found against one of three defendants, and in favour of the other two, the court deducted the costs of the latter out of the plaintiff's costs and damages against the one, notwithstanding that the effect of it was to deprive the attorney of his lien (1).

Even though they may have severed their defences.

And, consistent with such determination, the court has since allowed the set-off where the defendants have severed their defences, and appeared by different counsel and attorneys.

Thus where two defendants, defended separately in an action of trespass, wherein one succeeded but the other failed, the court permitted the successful defendant to set off his costs against the damages and costs recovered against the other, and thereby so far defeated the lien of the attorney (2). For the lien is allowed to the attorney on the supposition that he relies upon his client's case to cover himself from loss; but, if it were allowed to the extent, that one defendant should not be permitted to set off the costs of trial, where the verdict is in his favour, against the costs and damages payable by his co-defendant, no restriction would exist against an attorney including as many defendants as he might think proper (2).

And where the attorney is substantially the plaintiff.

A fortiori, the costs will, under such circumstances, be allowed where it is shown that the attorney is substantially the plaintiff in the cause, though nominally the action has been commenced by another (3).

So, the issues on which defendant succeeds.

So, in an action on the case, containing several counts in the declaration, where some issues were found for the plaintiff and some for the defendant, it was held that the master, in taxing the costs, was correct in deducting the costs of the defendant's issues from the plaintiff's costs,

(1) *George* v. *Elston*, 1 Bing. N. C. 513; 1 Hodges, 63, *S. C.*; 3 Dowl. P. C. 513, *S. C.*

(2) *Lees* v. *Kendall*, 3 Ad. & Ell. 707; 5 Nev. & Man. 340; 1 Har. & W. 316, *S. C.*

(3) *Pocock* v. *O'Shaunessy*, 6 Ad. & Ell. 807.

and that the lien of the plaintiff's attorney was only upon the balance due to him (1).

But no set-off of judgments will be allowed under the rule, even though they arise out of the same award, without previous satisfaction of the attorney's lien (2).

No set-off of judgments out of award allowed without payment of attorney's costs.

It is not only consonant with justice, but with the true interests of clients themselves, that the power of the courts should, at all times, be exercised for the protection of attorneys, in the recovery of the costs incurred in the prosecution of their clients' claims. They have, therefore, not only prevented, as we have seen, the setting-off of one judgment against another to the detriment of an attorney's right, but have vested, in the latter, remedies the most efficacious, for the prevention of fraudulent and collusive settlement of actions between plaintiffs and defendants, in order to deprive him of his costs.

Courts will not allow plaintiff and defendant to collude to defraud attorneys of costs.

Thus it has been held, that if a defendant, after service of process, collusively settle the matter in dispute with the plaintiff, in the absence of the plaintiff's attorney, the settlement is not binding on the latter (3).

Collusive settlement of action to deprive attorney of costs.

And where collusion has been proved to have existed between the defendant's attorney and the plaintiff, to deprive the plaintiff's attorney of his lien, as—where the money has been paid over by the defendant's attorney to the plaintiff, after notice of the lien of the plaintiff's attorney, the court has made an order on the defendant's attorney to pay over the sum claimed by the attorney of the plaintiff (4).

Order on defendant's attorney to pay plaintiff's attorney, after notice of lien disregarded.

And where a plaintiff has colluded with the defendant's bail, and his attorney, to deprive the plaintiff's attorney of his costs, by settling a debt, and accepting part payment

Plaintiff colluding with defendant's bail, plaintiff's

(1) *Eades* v. *Everatt*, 3 Dowl. P. C. 687.

(2) *Domett* v. *Helyer*, 2 Dowl. P. C. 540.

(3) *Cole* v. *Bennett*, 6 Price, 15; *Toms* v. *Powell*, 7 East, 536. But see *Charlwood* v. *Berridge*, 1 Esp. Rep. 345.

(4) *Reid* v. *Dupper*, 6 Term Rep. 361.

attorney may proceed against bail.

without the intervention of the plaintiff's attorney, the Court of Common Pleas has refused to restrain the plaintiff's attorney from proceeding against the bail, in order to recover such costs (1).

Notice ought to be given by plaintiff's attorney to defendant's attorney of any lien he may claim.

The necessity, or at least the policy, of giving notice of the lien of the plaintiff's attorney to the attorney of the defendant, therefore suggests itself, in every case where the integrity of the client is at all doubtful; for if the money be paid over *bonâ fide* to the plaintiff, before notice from the attorney of his lien, the court will not interfere.

Parties may settle actions if not done to deprive attorney of his costs.

The principle applicable to cases of this nature is perfectly clear, and has been thus explained. It is quite competent to parties to settle their actions behind the back of their attorney, unless it be affirmatively shown that the settlement was effected with a view of cheating him of his costs (2).

Plaintiff's solicitor suffering settlement, after notice, cannot proceed against defendant.

And where the plaintiff's solicitor, *with notice*, suffers the defendant to satisfy the demand of his client, without making effectual provision for payment of his costs, the court will not suffer him to proceed in the suit against the defendant, for the purpose of recovering them (3); for the ground of an attorney's right to go on with the suit, where his costs are not paid, and the matter has been compromised behind his back, is, that he, having been no party to the compromise, can have had no opportunity of stipulating for the payment of his costs (4).

If action collusively settled by deposit of bill of exchange, court will order it to

And, if the defendant, collusively with the plaintiff, settle an action, by depositing a bill of exchange in the hands of a third party, the court will order the bill to be given up to the plaintiff's attorney (5). But the attor-

(1) *Swain* v. *Senate*, 2 Bos. & Pul. 99; and see *Welch* v. *Hole*, Doug. 238; *Turwin* v. *Gibson*, 3 Atk. 730.

(2) *Jordan* v. *Hunt*, 3 Dowl. P. C. 666; *Nelson* v. *Wilson*, 6 Bing. 568.

(3) *Morse* v. *Cooke*, 1 M'Clel. 211; 13 Price, 473, *S. C.*

(4) *Ibid.* per Hullock, B.

(5) *Gould* v. *Davis*, 1 Cr. & J. 415; 1 Dowl. P. C. 238, *S. C.*

ney cannot call upon the court to interfere summarily against an individual who has deprived him of his costs, without showing that he himself has acted correctly. If, for instance, without a regular authority from the plaintiff, he has commenced an action of *replevin*, and the plaintiff, knowing the proceedings, has suffered the cause to be carried down to trial, and afterwards, concerting with the defendant, has entered up satisfaction on the record, without securing the attorney his costs, the court will refuse to vacate the entry of satisfaction (1). But, in all cases where execution has been irregularly obtained, the proper course to be pursued by the attorney, in the first instance, is by application to the court, for he will not be permitted to sue out a second execution, in order to obtain his costs (2).

be given up to plaintiff's attorney.

Attorney must have acted correctly himself.

A like practice is pursued too in equity. Thus, where the plaintiff's solicitor, with notice, suffered the defendant to make a collateral arrangement for satisfying the plaintiff's demand, without taking effectual security for the payment of his costs (as by suffering his client to take from the defendant his undertaking to the plaintiff, instead of to his solicitor, to pay the costs), the court would not suffer him to proceed in the suit against the defendant for recovery of them (3).

Like practice pursued in equity.

Where a plaintiff, without consulting his attorney, compromised an action with the defendant, and took upon himself the payment of the costs to the attorney, the Court of Common Pleas declined to interfere, in the absence of any proof of a fraudulent conspiracy to cheat the attorney of his costs (4).

Court of Common Pleas.

The cases upon which these decisions have been founded, have either evinced fraud or have related to

The lien must be claimed on

(1) *Abbott* v. *Rice*, 3 Bing. 132.
(2) *Greaves* v. *Eades*, 5 Taunt. 429.
(3) *Morse* v. *Cooke*, 1 M'Clel. 211; 13 Price, 473, *S. C.*
(4) *Chapman* v. *Haw*, 1 Taunt. 340.

liquidated damages.

liquidated demands, ascertained debts, or judgments obtained, on which the attorney's lien might attach. But the court will not interpose to assist an attorney in cases of purely unliquidated damages, when no such fraud appears. Pending an action of this nature, therefore, a notice from the plaintiff's attorney to the defendant's attorney, not to compromise the suit, would be insufficient to entitle the former to the interposition of the court, unless the existence of actual fraud, surprise, or misrepresentation, were shown (1).

Sum directed under award, equivalent to judgment.

But a sum directed to be paid under an award, is equivalent to a judgment, and, in every respect, entitles an attorney to a similar lien upon it for his costs. Where, therefore, one of the parties to the award is directed to pay a sum to his opponent, and does so, notwithstanding a notice to pay it into the hands of the attorney, the court will exercise a summary interference to compel him to repay the amount and the costs of the application; for the convenience, good sense, and justice of the thing require that an attorney shall have the same lien on damages awarded, as if they were recovered by the judgment of the court, in the ordinary course of the cause (2).

Parties cannot defeat attorney's lien by a reference.

And since parties cannot, by their own agreement, divest the attorney of his lien on the judgment, neither can they, by a reference of the cause to arbitration. Thus, where upon a reference of two causes, damages in the first were ordered by the award to be set off against costs in the second, it was held, that this could only be done subject to the lien of the plaintiff's attorney, in the first cause, to his costs (3).

(1) *Ex parte Hart*, 1 B. & Ad. 660; 1 Dowl. P. C. 324, *S. C.*

(2) *Ormerod* v. *Tate*, 1 East, 464; and see *Irving* v. *Viana*, 2 You. & J. 70.

(3) *Cowell* v. *Betteley*, 10 Bing. 423; 2 Dowl. P. C. 780; and see *Cadell* v. *Smart*, 4 Dowl. P. C. 760; *Doe d. Swinton* v. *Sinclair*, 5 Dowl. P. C. 26; 3 Scott, 42, *S. C.*

A right of lien upon a judgment is not affected by the statute of limitations. This statute bars the remedy only, not the debt; therefore, where an attorney for a plaintiff had obtained judgment, and the defendant was afterwards discharged under the Lords' Act, but at a subsequent period a *fieri facias* issued against his goods, upon which the sheriff levied the damages and costs, it was held, that notwithstanding the attorney had taken no step in the cause, or to recover the amount of his bill of costs within six years, he had still a lien for his charges on the judgment, and the court directed the sheriff to pay him the amount out of the proceeds of the goods (1). Statute of limitations does not affect lien on judgment.

It has been long held in the Court of Chancery that the acceptance of security for a debt due is a waiver of, and supersedes the right of lien (2); and the Lord Chancellor expressed a similar opinion in a case subsequently brought before the court (3). This doctrine was again discussed in the Court of King's Bench (4), when a distinction was taken between a running and undishonoured acceptance, and that, where bills taken as security had been refused payment, before the document on which the lien was claimed came into the hands of the attorney; and in the latter case, the lien was held not to be precluded from attaching. This decision would seem at variance with the opinion expressed by the Lord Chancellor, that it made no difference whether the securities were due or not; yet such distinction is not only reasonable, but recognised by later authority, and consistent with the rule laid down in all subsequent analogous cases (5). Accepting security for debt.

When afterwards the question was again brought be-

(1) *Higgins* v. *Scott*, 2 B. & Ad. 413.
(2) *Cowell* v. *Simpson*, 16 Ves. J. 275.
(3) *Balch* v. *Symes*, 1 Tur. & Russ. 87.
(4) *Stevenson* v. *Blakelock*, 1 M. & S. 535.
(5) See *post*. tit. "Vendors and Purchasers of Chattels-personal."

fore the court (1), Lord Ellenborough, C. J., observed, that a contract for a particular mode of payment was inconsistent with the right to detain the possession, and consequently would defeat a claim to the exercise of such a right. And it is true that where parties contract for a particular time or mode of payment, the workman has not a right to set up a claim to the possession inconsistent with the terms of his contract (2). The doctrine laid down in the case of factors and other traders is decisive of this question, that a party loses, by his own act, the right to retain as a lien, if he accept a security for the debt under which it is claimed, payable at a distant day (3), but it is equally clear that such lien revives, if, before possession be parted with, the acceptance or other security taken has been dishonoured or rendered nugatory.

Proving debt under client's commission, waiver of lien.

And it has been held, that if a solicitor who has papers in his hands relating to a bankrupt's estate, obtain an order under the commission to have his bill of costs taxed, and to be permitted to prove the amount to be found due on taxation, he thereby waives his lien; and, until such taxation, the assignees may inspect the papers (4). But such waiver, it is apprehended, would only result if, after having proved his debt, he were to do any act as a creditor, affecting the rights of others, such as signing the certificate, or the like (5).

If accompanied by any act affecting the rights of others.

Right of lien vests no power of sale.

The right of lien on the deeds of a client does not vest in a solicitor a right also to sell the property comprised in them, in order to satisfy his claim.

In a recent case, where the claimant of the lien had disposed of the lease of a bankrupt, and an action had

(1) *Chase* v. *Westmore*, 5 M. & S. 180.
(2) *Ibid.* 186.
(3) *Hewison* v. *Guthrie*, 2 Bing. N. C. 755; 2 Hodges, 54, *S. C.*
(4) *Ex parte Hornby*, Buck, 351; *ex parte Innes*, Buck, 357.
(5) *Ex parte Solomon*, 1 Glyn & J. 25.

been commenced against him by the assignees to recover the proceeds of sale, and a verdict had been found for them, subject to the opinion of the court above, Tindal, C. J. thus delivered the judgment (1). "The lease, at the time of the sale, was in the possession of the defendant, as a pledge or security for the payment of his demand against the bankrupt; being either in his possession as solicitor, under a claim upon it for his lien, which the law gives him, or having been expressly deposited with him as a security for his demand (2). In either case, the right and power of the defendant over the lease was precisely the same; he had the right to retain the lease in his possession until his demand was paid, and so far, by means of the possession of the lease, to enforce payment of his demand. But he had that right only; he had no right to sell the lease and to pay himself his demand out of the proceeds. So long as the lease remained in his possession, neither the bankrupt nor his assignee could retake it, without either payment of the demand, or a tender and refusal, which is equivalent to payment. But if, instead of keeping the thing pledged, he sells it, or enables any other person to sell it, by concurring in the sale, he is guilty of a direct conversion, and makes himself liable for the value of the lease, in an action of trover."

Attorneys not bound to deliver up papers on which lien claimed, till debt paid, or satisfaction given.

There must constantly occur cases in which justice and the necessity of parties may render it necessary for the courts to interfere to compel the production of papers detained by way of lien; but, until the demand authorizing the detention be paid, or otherwise satisfied, any application to the court or to a judge at chambers that they may be delivered up, will be unsuccessful (3). So,

(1) *Clark* v. *Gilbert*, 2 Bing. N. C. 353.

(2) *Sed vide ante*, p. 177, as to power of sale where the deposit is by way of equitable mortgage.

(3) *Re Thornton*, 2 Dowl. P. C. 156.

in the Court of Chancery, the language of every order which is made upon the subject is, that upon payment of what is due, the papers shall be delivered over; but where a party has a pressing necessity for papers, the court will order them to be delivered over upon a deposit being made which will cover, not only what is due upon the bill, but what may be due for the costs of the taxation (1).

But if solicitor withdraws from the cause, court will order delivery, without prejudice to his lien.

Where a solicitor has withdrawn from the conduct of his client's cause, and a change of the solicitor has, in consequence, taken place, the court has interfered to order actual delivery up to the new solicitor, of the briefs of the pleadings, counsel's opinions thereon, office copies of the answers, and all such other papers and documents connected with the cause, as, upon inspection, such new solicitor may deem necessary for the hearing of the cause, without prejudice, however, to the right of the original solicitor to a lien for his costs, and upon an undertaking to return them undefaced, within a limited time after the hearing (2).

Distinction between a voluntary withdrawal, and a a discharge, of solicitor.

But, it must be observed, such interference proceeded on the ground that the connexion of solicitor and client had, in fact, been dissolved by the client himself. The rule, in such cases, is altogether different, where the solicitor discharges himself, and where he is discharged by his client (3); for the courts have, in the latter case, shown a strong inclination to afford to the client every possible facility of furthering the progress of his suit. If the solicitor be actually discharged by his client, or the client, by his conduct, makes it impossible that he can any longer conduct the proceedings of the cause, he

(1) Per the Lord Chancellor, *Clutton* v. *Pardon*, 1 Tur. & Russ. 304; and see in *re Murray*, 1 Russ. 519.

(2) *Heslop* v. *Metcalfe*, 3 Myl. & C. 183.

(3) *Colgrave* v. *Manley*, 1 Tur. & Russ. 400; and see *Cresswell v. Byron*, 14 Ves. J. 271; *Lord* v. *Wormleighton*, Jac. 580.

will be considered as discharged by him, and will not be ordered to give up the deeds or papers relating to the cause till his costs are paid, but to produce them only, to be used at the hearing, or for inspection.

Formerly order was limited to inspection only.

Formerly such order was, in all cases, limited to inspection merely (1); and the client was thus driven to obtain copies of the papers, at a considerable expense, for the purpose of carrying on the cause. This distinction between cases where the withdrawal by the solicitor is purely voluntary, and where it arises by the act of the client himself, seems perfectly consistent with every principle of justice: for while, on the one hand, if the client choose, from mere caprice, to dismiss his solicitor from the further conduct of a cause, it is only fair and reasonable that the debt incurred, in the progress of the business, should be first liquidated; on the other, if the solicitor have withdrawn from it of his own accord, it is equally fair and reasonable that the client should not be subjected to the costs and expenses that would result from a detainer of the papers during a continuance of the suit.

Solicitor cannot stop the cause, but may decline to act further till costs paid.

But a solicitor may decline to proceed further in a cause till his costs are paid. "If a solicitor or clerk in court," observed Lord Eldon, "having engaged in the conduct of a cause, thinks proper to refuse to proceed without payment, he cannot stop the cause, but he may reasonably decline to act without payment, and if the client omits to pay, he cannot be compelled to part with the papers; but he must not delay the progress of the suit. The refusal of the solicitor or clerk in court to proceed, authorizes the client to employ others in their stead; and though the former solicitor or clerk in court cannot be compelled to part with papers, he must produce them for all purposes of the cause" (2).

(1) *Moir* v. *Mudie*, 1 Sim. & S. 232; *Commerell* v. *Poynton*, 1 Swans. 1.
(2) *Mayne* v. *Watts*, 3 Swans. 93.

Production will be ordered of deed in solicitor's possession, if sought to be impeached;

Where a deed, in the possession of a solicitor, is sought to be impeached, his client is entitled to have it produced, and no lien can prevent such production; for it is the very object of the suit that the deed may be declared a nullity (1).

So if directly required, and essential to a cause;

So, in a suit instituted by a wife against her husband, to enforce an ante-nuptial settlement, where the deed of settlement was retained by a solicitor, under a claim of lien against the husband, and he refused to produce it, the court compelled the production, and ordered him to pay the costs consequent on his refusal (2).

Not so, if collateral to the cause.

But where the right to the possession of a deed arises under a lien, altogether collateral to the cause, the court will not exercise a jurisdiction to compel the solicitor to produce it, otherwise than as a witness under a *subpœna duces tecum* (3).

Where action for costs is defended, on ground of negligence, order made to give copies, &c.

Where an attorney brought an action for his bill of costs, which was defended by the client, on the ground of negligence, he was ordered to give to the defendant a copy of a case, with the opinion of counsel thereon (which had been procured for the defendant by the plaintiff, as his attorney), at the defendant's expense; or to deliver up the case itself, on being paid the costs which the plaintiff claimed in respect of such case and opinion (4).

Or where decree for sale of estate of which deeds detained.

And where an estate was decreed to be sold, and the solicitor had no lien on the title-deeds, anterior to the suit, for the purposes of which they had come into his hands, the court ordered him to deposit them for the purpose of sale (5).

An attorney is bound to

But, though a solicitor has been compelled to produce

(1) *Balch* v. *Symes*, 1 Tur. & Russ. 96.
(2) *Brassington* v. *Brassington*, 1 Sim. & S. 455.
(3) *Buck* v. *Lewis*, 6 Mad. 29.
(4) *Evans* v. *Delegal*, 4 Dowl. P. C. 374.
(5) *Baker* v. *Henderson*, 4 Sim. 27.

the papers of his client for him; or, in case of his bankruptcy, for his assignees, even when not employed by them, in the cause for the purposes for which he received them; he is not bound to deliver them up, or even to produce them in any other business (1). And though the courts have extended to a plaintiff every facility for forwarding the progress of his suit, and conceded to him a strict liberty to discontinue his action, he can only do so, subject to the costs of the attorney and his lien in respect of them (2).

produce papers in cause to which they relate, after bankruptcy of client.

After satisfaction of the attorney's claim, all the drafts and copies of original deeds for which the client has paid, as well as the deeds themselves, are by law the property of the client; and though it may be convenient, in many cases, to leave them in the hands of the attorney, the client is the proper person to judge of that, and the court will entertain a summary jurisdiction and compel the delivery of them up, if he require it (3). The Court of Chancery exercises this jurisdiction in every case, and will order the delivery up of all deeds and papers in his possession, and of his bill of costs, whether there be any cause pending or not, and though no part of the costs have been incurred in respect of any action or suit at law or in equity (4).

After satisfaction of attorney's lien, client entitled to absolute redelivery of papers.

Court of Chancery exercises this jurisdiction whether cause pending or not.

The courts of common law have in general refused the application, where there has been no imputation of fraud or criminal conduct in his character of attorney, and where the papers have not come into his hands in any pending suit (5). The rule upon this subject seems to be,

Courts of common law have refused under such circumstances.

(1) *Ross* v. *Laughton*, 1 Ves. & B. 349.

(2) *Merrewether* v. *Mellish*, 13 Ves. J. 161; *Twort* v. *Dayrell*, *ib.* 191.

(3) *Ex parte Horsfall*, 7 B. & C. 528; M. & R. 306.

(4) In *re Murray*, 1 Russ. 519.

(5) *Cocks* v. *Harman*, 6 East, 404; *Goring* v. *Bishop*, Salk. 87. If there be a cause in court, it has been decided that the papers may be obtained upon a judge's summons, otherwise there must be a motion in court for a

that where an attorney is employed in a matter wholly unconnected with his professional character, the courts will not exercise a summary interference; but when the employment is so connected with his professional character as to afford the presumption that such character formed the ground of his employment by the client, the court will then summarily adjudicate (1).

And will not compel delivery when deposited for special purposes.

Thus they will not, on summary application, compel him to deliver up, on payment of what is due to him, deeds intrusted to him for the purpose of raising money upon them (2); nor, when a lease has been put into his hands for the purpose of making an assignment of it, there being no cause in court (3).

Papers in possession as steward of court, and receiver, on satisfaction of lien ordered to be given up.

But the court will, under some circumstances, entertain summary jurisdiction over an attorney of the court, in obliging him to deliver up deeds and papers on satisfaction of his lien, though they came into his hands as steward of a court, and receiver of rents (4).

If third party interested, security taken to permit inspection.

If it appear that a third person is interested in the papers, the court will take a security from the person to whom they are delivered to produce them on demand, for the inspection of such third person (5).

Court will not order personal representative of solicitor to deliver up till satisfaction made.

The court will not order the personal representative of a deceased solicitor to deliver up the papers in the cause to another solicitor, without payment, or security for payment, of the solicitor's bill (6). Nor where he holds a deed as a party or trustee, the court having no authority to interfere in a case of trust, even where a lien is alto-

rule to show cause. See Chit. Arch. Pr. vol. 1, p. 67, 7th edit.; *ex parte Higge*, 1 Dowl. P. C. 495; *ex parte Townley*, 3 Dowl. P. C. 39; *Wilson* v. *Northop*, 2 Cr. M. & R. 326.

(1) Chit. Arch. Pr. vol. 1, p. 66, 7th edit.

(2) *Ex parte Millard*, 1 Dowl. P. C. 140.

(3) In *re Lowe*, 8 East, 237; *Smith* v. *Cotterell*, 4 Doug. 205.

(4) *Hughes* v. *Meyre*, 3 Term Rep. 275.

(5) *Ibid.*

(6) *Redfearn* v. *Sowerby*, 1 Swans. 84.

gether disclaimed by the party in possession of the deed sought to be recovered (1).

Court will not decide the right of two defendants to re-delivery of papers.

When an attorney has in his custody the muniments of two co-defendants, the court will not enter into an investigation of the right of either party, nor refer it to the prothonotary to ascertain which of them he shall deliver over to one defendant, who may have paid the debt and costs (2). But where he has drawn an agreement between two parties, it would seem he will be ordered, upon motion to the court, to give up to either of them a copy thereof, to the best of his power, where the same shall be requisite, upon payment of costs (3).

But will order copies to be delivered.

On claim of lien, client entitled to have bills taxed.

Lastly, it may be added, that the fact of detention of a client's papers gives the court jurisdiction over an attorney's bills of costs, so as to enable it to tax them, though they contain no items which, in ordinary cases, would subject them to taxation, being entirely for conveyancing, or general business, and not in relation to suits (4).

Clerks of assize.

It has never yet been settled whether a clerk of assize is entitled to a lien upon the records of the court for his fees. In a case which came on upon a rule to show cause why an attachment should not issue against the defendant, who was a clerk of assize on the Norfolk circuit, for not obeying a writ of *certiorari* to remove an indictment for murder, and a special verdict founded upon it, the defendant insisted that he had a right to retain the record till he should be paid his fees for drawing, engrossing, &c., which the attorney for the prisoner refused to pay, on the ground of their being exorbitant. However, on the attorney's undertaking to pay as much as should, on a reference to the master, be reported to be due, the record was returned into the court: upon which the rule was

(1) *Pearson* v. *Sutton*, 5 Taunt. 364.
(2) *Duncan* v. *Richmond*, 7 Taunt. 391.
(3) *Clarke* v. *Ferret*, 1 Smith, 339.
(4) In *re Murray*, 1 Russ. 519; in *re Rice*, 2 Keen, 181.

discharged, Lord Mansfield saying that he should be very unwilling to determine that a clerk of assize had a lien on the records of the court for his fees, for that he foresaw great inconvenience from such a doctrine (1).

The point has since arisen incidentally in a recent case, but received no judicial determination. A side bar rule having been issued against the clerk of assize of the northern circuit, to return certain indictments which had been removed into the Court of Queen's Bench by writ of *certiorari*, an application was made by him to discharge the rule, grounded upon an affidavit stating that certain accustomed and undoubted fees remained unpaid in respect of such indictments; and that the prosecutor had been duly apprized of this fact. The court, however, gave no judgment upon this point, but held that, even admitting the right of lien under such circumstances, the affidavits of the clerk of assize ought to have shown that the prosecutor had notice of the precise amount of the fees due at the time when the return of the indictments was refused, notwithstanding such amount was allowed and fixed by act of Parliament (2).

Commissioners for taking acknowledgments.

Commissioners for taking the acknowledgments of married women under the 3 & 4 W. 4, c. 74, have a lien on all instruments in their joint possession, for the fees due in respect of the discharge of their duty as commissioners; or one, having the possession, may, on the authority of the other, detain it for that other's lien. But if one commissioner, detaining the instrument for his own fees only, receives them, and, after being required to give the instrument up, hands it over to his colleague, no lien attaches in favour of the latter (3).

Commissioners for the parti-

Commissioners appointed by the Court of Chancery for

(1) *Rex* v. *Bury*, Doug. 185, note 26; 1 Leach, C. C. 201, *S. C.*

(2) *Newton* v. *Bayley*; *in re Regina* v. *Harland*, Q. B. Trin. Term, 1839. Jurist, vol. 4, p. 192.

(3) *Ex parte Grove*, 3 Bing. N. C. 304; 3 Scott, 671, *S. C.*

the partition of estates, have no lien on the commission for their charges, and they cannot insist on payment, in the first instance, before they return the commission with their certificate (1). tion of estates have no lien on commission.

Nor can certificated conveyancers retain possession of the papers entrusted to their hands, as security for a general balance. Their right of lien is limited to those documents upon which the particular labour or skill has been expended. If, for instance, a lease be delivered to a certificated conveyancer by a person having a right to dispose of it, that he may do something upon the particular deed; by the general law of the land he has a lien upon it, whether he be an attorney or not; but, if it be another deed than that on which the operation is to be performed, it will be necessary for him to be an attorney or solicitor, to have the benefit of the custom, and to enable him to retain other papers than those on which the work is to be done (2). Nor certificated conveyancers on papers, &c.

A solicitor, acting as the steward of a manor, has a lien on the papers relating to the manor which come into his hands as solicitor (3). In a suit instituted against an attorney who had acted in the capacity of steward for an account and for the delivery of title-deeds, the court ordered the deeds to be given up, upon payment into court of so much of the balance claimed by the answer, as was not covered by any security (4). Solicitor acting as steward of a manor.

And as the right of a solicitor to lien cannot be acquired under an assumed character, or by tortious means, if he receive rents in a cause, without the authority of the court, he will be ordered to pay them over to the receiver, and cannot retain them on the ground of lien, or set them As receiver of rents.

(1) *Young* v. *Sutton*, 2 Ves. & B. 366.

(2) Per Gibbs, C. J., *Hollis* v. *Claridge*, 4 Taunt. 807.

(3) *Worrall* v. *Johnson*, 2 Jac. & W. 214.

(4) *Champernown* v. *Scott*, 6 Mad. 93; *Balch* v. *Symes*, 1 Tur. & Russ. 87.

off against costs alleged to be due to him from the plaintiff (1).

Agents in town.

Having thus far treated of the right of lien, as appertaining to attorneys and solicitors, in such character peculiarly, or by virtue of appointments or offices held by them as such, I proceed, in the next place, to point out under what circumstances, and to what extent, the exercise of the right is available by them, as agents in town.

Agent has lien on all papers in a particular cause.

The lien of an agent in town, in such character exclusively, differs from that of an attorney, inasmuch as his lien attaches only upon the money recovered, and upon the papers in his hands in the particular cause (2).

Voluntarily parting with them divests lien.

Such lien is discontinued by the agent voluntarily parting with possession of the papers, even though by mistake; but if they be obtained unlawfully out of his hands, his lien still attaches, and he may maintain trover for them (3). It follows, therefore, that an agent has no lien for the *general balance* due to him from a country attorney, upon the money of a client of the latter coming to his hands in a cause in which he acts as such town agent, because he must know that the money is received for the client's use (4). So, where the plaintiff's attorney was indebted to the plaintiff in a sum greater than the attorney's costs in the cause, the agent (to whom the plaintiff's attorney was indebted on the general account in a sum greater than the amount of the attorney's costs) could not, as against the plaintiff, retain out of the sum recovered by the plaintiff, more than the charge for agency in the particular cause; for, had the plaintiff applied at once to the agent to deliver up the papers, he would have had no power to retain

(1) *Wickens* v. *Townshend*, 1 Russ. & Myl. 361.
(2) *Dicas* v. *Stockley*, 7 Car. & P. 587.
(3) *Ibid.*
(4) *Moody* v. *Spencer*, 2 D. & R. 6.

them, after receiving the amount of his agency upon them (1).

In equity, agent has lien on the particular papers and fund in the cause.

So, in equity, an agent has a lien upon all papers, for what is due to him as agent in the cause, from the solicitor in the country; and he has a right to intervene with his claim of lien, not as against the client directly, but as against the solicitor employed by him; thus giving to the agent a right in equity to the money due, before the papers can be taken from him (2). And, where the agents of a country solicitor, who has become bankrupt, have received papers from him, belonging to his client, for the purposes of the client's business, they have a lien on them, as against the client, for the money due from him to the solicitor, and from the solicitor to them, on account of the business done in the cause; and when the client, after the solicitor's bankruptcy, pays to the agents the sum due from him to the solicitor, in order to obtain the papers, the court will restrain any action (though previously brought by the assignees for the recovery of it), on the ground of the agent's lien (3).

No answer by attorney to action by client for papers, that agent detains them as a lien.

But where an attorney has been employed, and received his bill from his client, it is no answer to an action of *detinue*, brought by the latter, for the papers delivered to him, that his London agents detain them as a lien against the attorney, for a general balance of account for business done (4).

Agent acting for an attorney, who is plaintiff, has lien on *postea* for costs.

An agent for an attorney, the plaintiff in a suit, who dies intestate and insolvent, pending a suit, has a lien for his costs upon a *postea*, of which he has obtained possession, after the death of intestate (5).

(1) *White* v. *Royal Exchange Assurance*, 1 Bing. 20; 7 Moore, 249, *S. C.*; and see *ex parte Baker*, 1 W. W. & D. 591.

(2) *Ward* v. *Hepple*, 15 Ves. J. 296, note (*a*); *ex parte Steele*, 16 Ves. J. 164.

(3) *Bray* v. *Hine*, 6 Price, 203.

(4) *Anderson* v. *Passman*, 7 Car. & P. 193.

(5) *Taunton* v. *Goforth*, 6 D. & R. 384.

Agent defending for an attorney, defendant, without any warrant to defend filed, cannot claim lien, &c.

But, where an agent pleaded on behalf of a defendant, who had been sued, by bill, as an attorney of the Court of King's Bench, without having filed any warrant to defend; it was held, on motion to stay proceedings in the action (in which the plaintiff was nonsuited), and where the plaintiff undertook to set off the defendant's costs against a judgment debt, due from him to the plaintiff, that the defendant's attorney or agent had no lien on such costs, for his own costs in defending the suit (1).

Town clerks.

Town clerks have not any power to detain the papers of a corporation for any charge, except such as arises in their professional character as attorneys. They cannot claim a lien on what they receive merely as town clerks, nor for business done purely in that character (2).

Clerks in court have lien on proceedings.

A clerk in court has a lien upon the fund in court, and also upon the decree and other documents in the cause, in respect of his fees and disbursements, incurred pending the suit. Therefore, where the plaintiff in a cause has employed two solicitors in succession, the first of whom has received his bill, including the usual fees and payments to the clerk in court; and, by the second, effects a compromise of the suit, and thereupon moves that the fund in court be paid over, the application will not be granted, unless subject to the demand of the clerk in court (3).

This lien extends to all collateral proceedings, as well as to a decree.

Client cannot, by voluntary release to adversary, defeat right of lien.

If a client, by composition, or for other reasonable consideration, fairly and honestly release his adversary, there is no equity for the clerk in court for the payment of his costs; but if he voluntarily release him, the

(1) *Vansandau* v. *Burt*, 1 D. & R. 168.

(2) *Rex* v. *Sankey*, 5 Ad. & Ell. 423; 2 Har. & W. 275, *S. C.*; *nomine Rex* v. *Williams*.

(3) *Potter* v. *Hyatt*, 2 You. & Col. 112.

court will not permit the lien of the clerk in court to be thereby defeated (1).

No right to detain papers for money advanced to client's solicitor to carry on the cause.

A clerk in court has however no right to detain the papers of a suitor, for money advanced to the solicitor to carry on the suit (2); but when the suitor has not paid the amount of his bill to the country attorney, the court will direct payment into the hands of the clerk in court; for though the country client is not bound to pay the clerk, the court will allow the latter to retain any papers he may have in his possession (3).

Six clerks.

Six clerks are entitled to retain papers in their hands for their fees, though their clients have paid their solicitors, and the solicitors have satisfied the clerks in court the whole of their bills (4); and a sworn clerk cannot retain from a six clerk his proportion of the fees, though the former has given credit to the client (5).

Clerk of enrolments in bankruptcy.

It has been decided, that if a bankrupt obtain an order for the enrolment of any part of the proceedings, the clerk of the enrolments has not any lien against the assignees for his fees (6).

(1) Anon. 2 Ves. Sen. 25.

(2) *Gray* v. *Cockerill*, 2 Atk. 113; Anon. 2 Ves. Sen. 25.

(3) *Farewell* v. *Coker*, 2 P. Wms. 460; and see *Waldron's case*, 2 Str. 1126; *Rex* v. *Smollett*, 3 Burr. 1313. The Court of King's Bench will grant a rule for the clerk of the crown office, or a clerk in court, where their bills have been included or taxed in the attorney's bill, to be paid immediately by the client.

(4) *Taylor* v. *Lewis*, 2 Ves. Sen. 111; 3 Atk. 727, *S. C.*

(5) *Ex parte Six Clerks*, 3 Ves. J. 589.

(6) *Ex parte Sandeson*, 1 Rose, 275; 19 Ves. J. 161.

CHAPTER XVI.

FACTORS, BROKERS, AND AGENTS.—BILL BROKERS.—SHIP BROKERS.—INSURANCE BROKERS.

1. FACTORS, BROKERS, AND AGENTS.

Factors have a general lien;

EVERY factor, to whom a balance is due, has a general lien upon the goods of his principal, so long as they remain in his possession (1). This point was first considered before Sir John Strange, then Master of the Rolls, in *Kruger and another* v. *Wilcox* (2); and it was decreed, that such lien attached not only for incidental charges, but as an item of mutual account for the general balance due to the factor. So a factor, to whom goods are consigned, and who is in advance with his principal, has, in respect of his general lien, such an interest in the goods, that he may insure them for his own benefit, and retain his lien on the policy, so long as it remains in his possession (3).

And may insure goods in their possession, to secure their lien;

And retain the policy.

In *Lickbarrow* v. *Mason* (4), Buller, J. observes, "a factor, by the general usage in trade, may retain, for the balance of his account, all goods in his hands, without regard to the time when, or on what account, he received

(1) *Godin* v. *London Assurance Company*, 1 Burr. 490; 1 W. Bl. 104, *S. C.*; *Drinkwater* v. *Goodwin*, Cowp. 251; *Cowell* v. *Simpson*, 16 Ves. J. 280; *Walker* v. *Birch*, 6 Term Rep. 258; *Gardner* v. *Coleman*, cited 1 Burr. 494; *ex parte Emery*, 2 Ves. Sen. 674.

(2) 1 Burr. 494 (12th March, 1754). In *Green* v. *Farmer*, 4 Burr. 2218, Lord Mansfield says, "it was doubted, before the case of *Kruger* v. *Wilcox*, whether a factor had a lien, and could retain for his general account;" and see per Lord Hardwicke, Amb. 252.

(3) *Godin* v. *London Assurance Company*, 1 Burr. 490.

(4) 2 Term Rep. 63.

them." And if a trader, before an act of bankruptcy, place a cargo of coals in the possession of a factor for sale, and while in the course of disposing of them, the trader become bankrupt, the factor may proceed with the sale, receive the money, and hold it in payment of any balance due to him (1).

If principal become bankrupt, during sale of goods, produce may be retained.

And inasmuch as the right of lien attaches not only on the goods themselves, but on the proceeds of sale, where the factor has authority to dispose of them, it necessarily follows, that the factor's right may be so communicated to a purchaser to whom the factor is indebted, as to enable the purchaser to set off the amount of a debt due from the factor, and not exceeding the factor's claim, against the price of the goods. Thus, where the owner of goods was indebted to a factor, in an amount exceeding their value, and consigned them to him for sale; and the factor, being indebted to another, sold them to him, and afterwards became bankrupt; it was held, that on the settlement of accounts between the buyer and the assignees of the factor, the former might be allowed to credit the assignees for the price of the goods, and then prove the residue of his claim against the estate. Such right is consistent and co-extensive only with the right of the factor himself, who, having a lien on the whole price of the goods, might have enforced payment to himself, in opposition to the principal. The settlement, therefore, between the vendee and the assignees of the factor, of their mutual accounts, affords, under such circumstances, a good answer to an action against the vendee, for the price of the goods, brought either by or on account of the original owner (2).

If factors have authority to sell goods, on which lien exists, buyers may set off debts due from factors.

The mere circumstance of the factor's bankruptcy does not destroy his right, in respect of the money re-

Bankruptcy of factor does not prevent the

(1) *Robson* v. *Kemp*, 4 Esp. Rep. 236.
(2) *Hudson* v. *Granger*, 5 B. & Ald. 27.

right of lien on money received;

ceived by him; for though the bankruptcy undoubtedly operates as a countermand of his authority to receive the price on account of his principal, it does not operate to destroy his right to receive it on his own account, in respect of his lien (1).

Nor knowledge of principal's insolvency when money advanced.

And it has been held, that such right of lien is not defeated by proof that the factor knew at the time of an advance of money to a principal, that the latter was in insolvent circumstances (2).

On principal's bankruptcy, power of agent to restrain assignees.

An agent carrying on business in his own name, but on the behalf of a principal, at a fixed salary, has been held to be entitled, on the bankruptcy of the principal, to an injunction to restrain the assignees and messenger, under the commission, "from taking possession of or selling the business or concern, or the premises where it was carried on, or the stock in trade and effects thereof, and from collecting or receiving any moneys due or owing to the concern, or in anywise intermeddling or interfering therewith," till he has been indemnified against the liabilities incurred by him as such agent. As between the agent and principal, the former is considered, so far as regards the debts of the particular business, a surety for the latter, and has therefore a lien on the business, the stock employed in it, and the debts owing to it, to the extent of the liabilities which he has incurred on account of it; with a consequent right to

(1) *Hudson* v. *Granger*, 5 B. & Ald. 27.

(2) *Foxcroft* v. *Devonshire*, 2 Burr. 931. "It is no fraud," observed Lord Mansfield, "for a factor, knowing the circumstances of his principal to be desperate, and believing that he must break unless he can procure credit, to advance money upon his bills, to save him from immediate failure; on the contrary, it is an honourable, friendly, and generous act: no prejudice can arise but to the lender himself. If, by his assistance, the principal has the good luck to stand his ground, he and all his creditors are benefited, but none of his creditors can suffer by the advancement of money to their debtor. Many beneficial instances of this kind have saved the most considerable houses from ruin."

have the proceeds of the property applied in the discharge of those liabilities (1).

Assignee of goods and policy takes subject to factor's lien.

The assignee of a policy of insurance on goods, having become such by the endorsement to him of the bill of lading of the goods by the consignor, after he has directed his correspondent to effect the insurance, takes it subject to the lien of the correspondent of the consignor for his general balance; and though the policy may not have come directly into the hands of the correspondent, but be in the possession of a broker, employed by him to arrange the insurance, yet the correspondent's right equally attaches. The virtual possession is in the factor, through the agency of the broker, acting under his immediate orders (2). The broker, therefore, is entitled to hold the policy, as the servant of the factor. Such possession, however, by the insurance broker, with the knowledge that the insurance has been effected on behalf of a third person, will not entitle him to any claim or lien, for a general balance, against the factor himself (3).

Factors having become sureties for their principal, have lien:

The doctrine in favour of factors affords them not only a protection in case of outstanding claims against their principals, but an indemnity against personal liability, in those instances where they have become surety for them (4).

So brokers, for advances, acceptances, &c.

So a broker, advancing money, and giving his acceptances, on the credit of goods lodged in his hands, has a lien on them, and may retain them until the owner gives him a full indemnity (5); and such lien is available even against the crown (6).

Even against the crown.

Guarantee

The lien thus claimed must, however, be in respect of

(1) *Foxcroft* v. *Wood*, 4 Russ. 487.

(2) *Man* v. *Shiffner*, 2 East, 522.

(3) *Ibid.*; and see *Snook* v. *Davidson*, 2 Camp. 218.

(4) *Drinkwater* v. *Goodwin*, Cowp. 251; *Hammonds* v. *Barclay*, 2 East, 227; *Houghton* v. *Matthews*, 3 Bos. & Pul. 489.

(5) *Pultney, Bart.* v. *Keymer*, 3 Esp. Rep. 182.

(6) *Rex* v. *Lee*, 6 Price, 369.

made by broker must be authorized by principal.

a guarantee authorized by the principal; for if a broker, in the exercise of his own judgment, and without the knowledge and approbation of his principal, render himself personally responsible on the purchase of goods ordered by the principal, he does it in his own wrong; and if the sale be completed, and the goods delivered to the principal, or to his use, no lien attaches upon them for the amount for which the factor has chosen to render himself responsible.

Accordingly, where a broker was directed to purchase a quantity of hemp upon terms prescribed by his principal, but on the purchase voluntarily superadded his personal indemnity for payment, without apprizing the latter of that circumstance, and the goods were subsequently delivered to the broker; it was held, that on the bankruptcy of the principal, the broker had no specific remedy against the goods in his possession (1). The delivery to the broker, in such case, amounted to a virtual delivery to the principal, for they were on his account and for his use, and the possession, therefore, essential to the exercise of the right of lien, was gone. But, if the purchase had been made on the personal credit of the broker, even without the sanction of the principal, and the goods had not been actually or constructively delivered into the principal's possession, the broker would no doubt have been entitled to stop them in order to protect himself (2).

Lien paramount to an extent by the crown.

The lien of a broker, for his advances and acceptances, is available, as observed, against the crown, and has been held to be paramount to an extent issued by the crown, which cannot compel him to give up his lien, without paying him the sums advanced to his principal on the faith of the consignment. Thus, where a factor, to whom goods were sent for sale, had accepted bills of exchange, drawn on him by his principal, to the extent

(1) *Gurney* v. *Sharp*, 4 Taunt. 242.
(2) *Hawkes* v. *Dunn*, 1 Tyr. 416; 1 Price, P. C. 24, *S. C.*

of their value, he was adjudged to have a lien on the goods and the purchase money, available against the crown, where a seizure had been made by the sheriff under an extent against the principal for a debt due to the crown (1).

Interest of sum for which lien claimed.

Where certain persons, who were factors of a person who became bankrupt, held a large quantity of sugar in their hands at the time of the bankruptcy, for which they had a lien for £41,000 and upwards, and interest for previous advances, and deferred the sale of it at the request of the bankrupt before bankruptcy, and of the assignees afterwards, in expectation of a rising market, and the sugar was eventually sold to great advantage; it was held, that the factors were entitled to apply the proceeds of the sugar in payment of the interest of the debt accruing after the bankruptcy, and to prove for the balance of the principal, without any deduction being made in respect of the interest so received (2).

Goods on which lien claimed must be in actual possession.

In order to perfect the right to lien—a right which is in the nature of a pledge—the goods on which it is claimed must have come into the *actual possession* of the factor; and if, on the faith of a consignment agreed to be made to him by his principal (and without endorsement or transfer of the bill of lading) he accept bills drawn by the latter, and before the cargo consigned reaches his possession, both he and the principal become bankrupt, the assignees of the factor have no property in such cargo, and cannot recover the produce of it against the assignees of the principal, if they have sold it, and received the purchase money (3). Till arrival at the place of destination, the principal has the power of stopping the goods *in transitu;* and the payment of freight, in the factor's

(1) *Rex* v. *Lee*, 6 Price, 369.

(2) *Ex parte Kensington*, 1 Deac. 58; 2 Mon. & Ayr, 300.

(3) *Kinloch* v. *Craig*, 3 Term Rep. 119, and *ib.* 783; *Bruce* v. *Wait*, 3 Mee. & W. 15.

capacity, does not amount to such constructive possession as to divest the principal of his right.

Mere consignment not sufficient.

The mere circumstance that, when a principal consigns goods to his factor for sale, he at the same time draws on the factor upon account of the proceeds, does not of itself give to the factor a right as well to detain such consignments as shall come to his hands, as to anticipate the possession. But if, in the course of the transaction, there has been a specific pledge, and bills are accepted on the credit of a particular consignment, which is accordingly appropriated to the factor by endorsement and delivery of the bill of lading, so as to change his character of factor, and make him a contractor on a special account, with reference to a distinct security, the case is different (1).

Unless consigned, as distinct pledge, by endorsement of bill of lading.

Distinction between principal and factor, and consignor and consignee.

An obvious distinction exists between the case of parties dealing in the relation of principal and factor, where the consignment of the goods is made for the express purpose of enabling the factor to receive the property, and carry it to the account of his principal, and that of others dealing in the character of consignor and consignee. In the one case the factor, on receipt of the proceeds, is entitled to his lien upon them to the extent of his indemnity, but has no rights antecedently to possession, in respect of the consignment, except such as he has in his representative character of factor, in order to effectuate the object of the consignment; in the other, he becomes entitled to the cargo, under the specific arrangement; or, as it were, the anticipated pledge, by endorsement and delivery of the bill of lading, to be held as collateral security; for he is thereby invested with such a symbol of property in the goods, though existing in a distant place, as to operate as a *bonâ fide* constructive delivery, equivalent to an actual transfer of the goods.

Accordingly, it has been held that, where an agreement

(1) *Patten* v. *Thompson*, 5 M. & S. 350; *Vertue* v. *Jewell*, 4 Camp. 31; *Cuming* v. *Brown*, 9 East, 506; *Wright* v. *Lawes*, 4 Esp. Rep. 82.

existed, that in consideration of being permitted to draw bills, the drawers should consign goods on their account to the drawees for sale; and that the latter should receive the usual commission on the sales, and out of the proceeds indemnify themselves against the acceptances; the relation of factor was not created, but that of consignee, to whom the bill of lading was remitted, and that the latter was entitled to the goods, though the consignors had become bankrupt before the ship sailed, and their assignees had obtained possession (1). The bill of lading, being transmitted for a valuable consideration, here operated as a change of property *instanter*, when the goods were shipped; and the case is governed by the same principle upon which it has been decided, that where a bill of lading, making the goods deliverable to a factor, was (upon proof from correspondence of the intention of the principal) to vest the property in a factor, as security for antecedent advances, it gave him a special property the instant the goods were delivered on board of the ship, so as to enable him to sue the master of it for their non-delivery (2). For if the intention of the parties to pass the property, whether absolute or special, in certain ascertained chattels, be established, and they are placed in the hands of a depositary, no matter whether such depositary be a common carrier, or ship master, employed by the consignor or a third person; and the chattels are so placed on account of the person who is to have the property, and the depositary assent, it is enough; and it matters not by what documents this is effected, nor is it material whether the person who is to have the property be a factor or not; for such an agreement may be made with a factor, as well as any other individual (3).

(1) *Haille* v. *Smith*, 1 Bos. & Pul. 563; and in *Kinloch* v. *Craig*, 3 Term Rep. 119, Ashurst, J., admits the position to be true as between consignor and consignee.

(2) *Anderson* v. *Clark*, 2 Bing. 20.

(3) *Bryans* v. *Nix*, 4 Mee. & W. 791; per Parke, B.

Death of principal before arrival of cargo, no revocation of consignment, if subsequent possession acquired.

The death of the principal, before the arrival of the cargo, does not necessarily operate as a revocation of the consignment, so as to prevent the factor or consignee from claiming a lien in respect of disbursements and expenses attendant upon the consignment, even though he be only surety for some of those expenses, if the cargo subsequently reach his hands. Thus, where a principal gave notice to his factor of an intended consignment of a ship to him, for the purpose of sale, and, in consideration of it, drew bills upon and obtained the acceptances of the factor, and then died, whereupon his executors directed the captain of the ship to follow his orders, and the ship was accordingly delivered into the possession of the factor, and sold; it was held, that the factor had a lien upon the proceeds, as well for the amount of money disbursed by him for the necessary use of the ship on its arrival, and for the acceptances actually paid by him, as for the amount of all outstanding acceptances not then due; the conduct of the executors, after the death of the principal, being a sufficient affirmation of the factor's authority (1).

Possession must be authorized.

In this case the possession was actually in the factor, with the concurrence and under the authority of the parties from whom, as representatives of the deceased owner, the demand of the factor was due.

If unauthorized, no right of lien conferred.

But where there has been no appropriation of goods, so as to constitute a property in the party claiming the lien; and the transaction between the factor and consignor rests merely on an agreement that the latter shall consign to the former a certain cargo, on the faith of which, the factor is induced to accept bills in favour of

(1) *Hammonds* v. *Barclay*, 2 East, 226. In *Chapman* v. *Derby*, 2 Vern. 117, it was held, that where a factor advanced money to his principal, who was a clothier, relying on the credit of cloths remaining in his hands to reimburse himself, and the clothier died indebted by specialty more than his assets were worth, the factor could not detain the goods; for it would have amounted to a *devastavit* in the administrator, to have given preference to the factor's debt. But this decision would not now be sanctioned by the courts.

the consignor, and the consignor fails in the performance of the agreement, the factor has no claim on the cargo, by way of lien, for the amount of such bills, if it afterwards reach his possession, without the consignor's concurrence. The following case affords an instance illustrative of this position.

One Coombe, a corn-merchant, at Waterford, had been in the habit of consigning cargoes of grain, &c., to a person of the name of Bruce, who carried on business in Bristol, as a corn and provision merchant and commission agent, for sale on commission; and Bruce had been in the habit of accepting bills on the faith of such cargoes. On the 12th of December, 1836, Coombe wrote to Bruce, as follows: "I note your market continues bare of good oats, of which I will ship you a cargo, per first opportunity. Should prices decline during the week, I may probably draw on your house again, in anticipation, for 500*l.* or 600*l.*" On the 20th of December, Coombe wrote again to Bruce: "Conformably with the intimation given in my last, I have again valued on your house for 550*l.*, in anticipation, at two months' date. Some coal-laden vessels are now arriving, and I hope a few days may enable me to procure freight for a cargo of good oats, and which, from the tenor of your letter, I infer you will wish to have at Bristol rather than Gloucester." A bill of exchange, for 550*l.*, was accordingly inclosed in this letter, which Bruce, on the 27th, accepted, and returned to Coombe. On the 5th of January, Coombe wrote again to Bruce, as follows: "After a long and determined struggle against our ship-brokers and high freight, I have, at length, succeeded in effecting a small reduction of 2*s.* per ton; and on receipt hereof, I will thank you to insure 600*l.*, on oats, per Blenheim, A 1, of Waterford, D. Doody, master, from hence to Bristol. I believe the vessel will be ready to commence loading in a day or two." On the

13th of January he wrote: "About four hundred barrels of the oats are already on board, and I hope to complete the shipment to-morrow or Monday next." On the 23rd Coombe wrote to Bruce, informing him that he was under the necessity of suspending his payments; and, on the same day, he sent the bill of lading of the oats, signed by D. Doody, the master of the Blenheim, and endorsed by Coombe in blank, to Mr. James Harris, a corn-merchant in Bristol, inclosed in a letter, in which he stated, that the vessel was ready for sea, and desired Harris to sell the oats on his (Coombe's) account, on their arrival, but gave him no intimation of his previous engagement with Bruce, or of the embarrassed state of his affairs. Harris, immediately on receiving the bill of lading, sent it to Bruce, requesting him to act for him in the business. On the arrival of the vessel at Bristol, on the 31st of January, Bruce took possession of the cargo, and paid the freight. The defendants, Messrs. Wait and James, who were creditors of Coombe, also claimed to take the cargo, under a foreign attachment, and subsequently an officer of the court came on board the vessel, took possession of the cargo, and delivered it over to the defendants; the court held, that no property had been transferred, independently of the subsequent transaction, and that the goods being in the hands of the plaintiff, Bruce, as the agent of Harris only, not of Coombe, he had consequently no lien, and could not maintain trover against the defendants (1). But it would have been otherwise, had the bills been drawn, or advances made, under such an agreement as would have amounted to an appropriation of the proceeds of a specified cargo of a particular ship, already consigned (2); or, if the bill of lading had been remitted prior to the arrival of the vessel (3).

(1) *Bruce* v. *Wait*, 3 Mee. & W. 15; Mur. & Hurl. 339, *S. C.*
(2) *Fisher* v. *Miller*, 1 Bing. 150; 7 Moore, 527, *S. C.*
(3) *Haille* v. *Smith*, 1 Bos. & Pul. 563.

And where certain brokers, on behalf of their principal, purchased goods of B. and Co., and agreed with them, that they should remain on their premises one month, free of rent, and after that time, that their principal should pay rent until removal; and subsequently the brokers, without any direction from their principal, and after an act of bankruptcy committed by him, took the goods into their own possession; it was held, that they could not, by this unauthorized transfer of possession, obtain a lien on them, as against the assignees of the principal (1).

Transferring goods from principal's warehouse to factor's, without consent, vests no right of lien.

And since, as it is seen, the possession under which the lien accrues, must have been authorized and *bonâ fide* acquired, it follows necessarily that no right can be derived under a tortious acquisition of property. Thus, actual possession given to a factor, by a carrier, by order of the shipper, after his (the shipper's) bankruptcy, is not such a possession as will give the factor a lien against the assignees, although the goods were shipped on his account, and bills had been accepted by him, on the faith of the shipment. Such order, given by the shipper, instead of strengthening, operates rather to defeat any claim to lien, as being an act of ownership exercised by the bankrupt (2).

Tortious possession given by a bankrupt, after act of bankruptcy, not available against assignees;

But where money was advanced to a bankrupt, before his bankruptcy, upon the collateral security of a policy of insurance and letters of advice, together with an undertaking by the bankrupt to deliver the property, which was at sea, and to endorse the bill of lading immediately upon its arrival; and the bill of lading was accordingly endorsed as soon as it arrived, although after the bankruptcy; it was held, that the creditor having ob-

But policy of insurance, &c. given to a creditor, prior to bankruptcy, and bill of lading of goods at sea endorsed to him subsequently, in pursuance of agreement, held valid.

(1) *Taylor* v. *Robinson*, 2 Moore, 730; and see *Nicholas* v. *Clent*, 3 Price, 547.

(2) *Nicholas* v. *Clent*, 3 Price, 547; and see *Madden* v. *Kempster*, 1 Camp. 12.

tained possession of the goods on their arrival, had a lien upon them (1). Here the policy of insurance was in the creditor's hands: abstracted from the operation of the bankrupt laws, vesting in the assignees all goods and chattels in the reputed ownership of the bankrupt, it is clear that the creditor had, in equity, acquired a right to the policy and the property at sea. A mere equitable power of redemption remained in the bankrupt, and if he did not deliver actual possession, it was because he had not more than symbolical possession to deliver.

Possession for a specific purpose.

So, possession for a specific purpose; as where the registry of a ship is given to a factor, by the owner, in order that he may discharge the duties payable at the custom-house, vests no such possession as to entitle the factor to a lien upon it for his general claim (2).

Abandonment of possession is a waiver of lien.

Abandonment of possession has been deemed to amount to a cession of the right of lien, from the very earliest case establishing such right in favour of factors and brokers (3). But the generally admitted doctrine, that a lien can be claimed only in respect of goods in actual possession, does not prevent the operation of the right, where the goods are retained by another, on behalf of the party claiming to exercise it. By the term abandonment is meant an unqualified dispossession, for it has been already shown, that a factor may have virtual possession through the agency of another, acting on his behalf and under his orders (4). So where, having a lien upon property, he deposits it with a third party as a security for the like amount, apprizing him of his lien, and appointing him to keep possession as his servant, the lien is not thereby extinguished (5).

(1) *Lempriere* v. *Pasley*, 2 Term Rep. 485.
(2) *Burn* v. *Brown*, 2 Stark. Rep. 272.
(3) *Kruger* v. *Wilcox*, 1 Burr. 494.
(4) *Man* v. *Shiffner*, 2 East, 522; and see *ante*, p. 39 and 249.
(5) *M'Combie* v. *Davies*, 7 East, 7.

So, a factor abroad, employed by a trader in this country, to ship him certain goods, which he procures, in his own name, and upon his own credit, without naming the trader here, and ships them to him at the original price, charging only commission, may be so far considered a vendor, as between him and the trader here, that on the bankruptcy of the latter, he may stop the goods *in transitu*, by procuring the bill of lading from the bankrupt's brother, even though the trader here had, before his bankruptcy, accepted bills, drawn on him by his correspondent, for the amount of the goods (1). This cannot, however, be considered as affecting the general proposition, that actual possession is the essential foundation to a factor's claim of lien. It is the common case of consignor and consignee, when the former has not been paid for his goods, and he gets the bill of lading honestly into his possession, and stops the goods while they are *in transitu* (1).

A factor abroad, in some respects, considered as a vendor, so as to re-seize goods in transit to principal, if not paid for.

It is unnecessary to consider how far the lien might revive, in case the goods, with the possession of which the factor has parted, were again to come into his hands, in the ordinary course of business; for since his lien is a general one, it follows, of course, that all goods, whenever in his possession, are answerable for the amount of his claim.

How far lien revives, in general cases, on recovery of possession.

In the case of factors and brokers, as in all others, the right of lien, for a general balance, may be defeated by express agreement between the parties; or by any circumstances in the case, tending to exclude the application of the general rule in their favour. Thus it occurs, when goods are deposited with a factor, for a particular purpose, as for sale, with an understanding that the proceeds shall be duly handed over to the principal (2), or

Lien may be defeated by agreement.

(1) *Feise* v. *Wray*, 3 Term Rep. 93, per Grose, J.

(2) *Walker* v. *Birch*, 6 Term Rep. 258; and see *ante*, p. 40.

Only extends to transactions within course of dealing, as agent.

to a particular creditor (1). Nor does the right of lien pertain, in respect of a balance due to the factor, before he became invested with that character. For instance, where a factor, employed in that capacity, sold goods to another, in his own name, and subsequently to the sale, and before payment of the purchase money, became factor to the vendee, who thereupon sent him a quantity of goods to be sold, not having before employed him in such character, and then became bankrupt; it was held, that the factor could not retain the goods so placed in his hands, for the price of the former goods sold (2); for the doctrine of lien applies only to cases where goods have been delivered in the nature of a pledge; and if the person claiming the lien has never before a particular transaction, acted as factor of the party against whom he claims, it cannot be considered that the goods are deposited as a general pledge (3), for antecedent debts of every description.

Charges must be reasonable, and warranted by course of dealing.

The charges for which the claim is made, must also be reasonable and warranted by necessity, or the customary course of dealing between principals and agents. But where possession of goods has been wrongfully withheld from the factor, by the master of a ship, and proper steps have been taken to recover possession, the attendant expenses of a suit of law, and of a reference previously entered into, but not concluded, have been allowed to constitute a fair and proper charge (4).

Special contract for future payment defeats right of lien:

A special contract for a particular mode of payment, operates as a waiver and abandonment of the right of lien. And, though the work be commenced under an

(1) *Weymouth* v. *Boyer*, 1 Ves. J. 416; *Maber* v. *Massias*, 2 Bla. Rep. 1072.

(2) *Houghton* v. *Matthews*, 3 Bos. & Pul. 485.

(3) *Walker* v. *Birch*, 6 Term Rep. 258, per Lawrence, J.; and see *Olive* v. *Smith*, 5 Taunt. 56; 2 Rose, 122; *Weldon* v. *Gould*, 3 Esp. Rep. 268.

(4) *Curtis* v. *Barclay*, 5 B. & C. 141; 7 D. & R. 539, *S. C.*

implied contract, if afterwards a special contract be made for payment, in the nature of the thing, the one contract destroys the other (1). *A fortiori*, if security be taken for the debt for which the party has a lien upon the property of a debtor, such security being payable at a distant day, the lien is gone (2). This limitation of the right must, however, be understood as affected by stipulations as to the time only, and not as to the amount, of payment; for it is now clearly settled, that no agreement between the parties, as to the amount to be paid, unless accompanied by other terms, as to the mode or time of payment, will defeat the exercise of the right of lien (3).

So, security taken for payment:

Not so, contract as to amount.

The right of lien cannot be transferred by the *tortious* act of the broker, factor, or agent, claiming it. At common law, it was long held, that an agent authorized to sell goods, could not vest in a pawnee any right or claim against the principal, even though, permissively, the apparent owner of them, unless for money advanced for purposes connected with the sale, and for which brokers, in the ordinary course of disposing of goods, are accustomed to advance it (4). "Nothing could be clearer," observed Lord Ellenborough (5), "than that liens were personal, and could not be transferred to third persons, by the *tortious* pledge of the principal's goods. That, whether or not, a lien might follow goods in the hands of a third person, to whom it was delivered over by the party having the lien, purporting to transfer his right of

How far lien transferrable.

Factor had no right, at common law, to pledge.

(1) *Cowell* v. *Simpson*, 16 Ves. J. 275; *Weldon* v. *Gould*, 3 Esp. Rep. 267; *Worrall* v. *Johnson*, 2 Jac. & W. 214; *Houghton* v. *Matthews*, 3 Bos. & Pul. 485.

(2) *Hewison* v. *Guthrie*, 2 Bing. N. C. 755; 2 Hodges, 51, *S. C.*

(3) *Chase* v. *Westmore*, 5 M. & S. 180.

(4) *Martini* v. *Coles*, 1 M. & S. 140; *Paterson* v. *Tash*, 2 Str. 1178; *Daubigny* v. *Duval*, 5 Term Rep. 607.

(5) *M'Combie* v. *Davies*, 7 East, 6; and see *Sweet* v. *Pym*, 1 East, 2.

lien to another, as his servant, and in his name, and as a continuance, in effect, of his own possession; yet it was quite clear, that a lien could not be transferred by the tortious act of the broker pledging the goods of his principal, which he had no authority to do." This decision, his lordship wished to be fully understood, as applying to a *tortious* transfer, by the broker undertaking to pledge them as his own, and not to the case of one who, intending to give a security to another to the extent of his lien, delivers over to him the actual possession of the goods on which he has the lien, with notice of his lien, and appoints that other, as his servant, to keep possession of the goods for him; in which it was accordingly decided, that he might preserve the lien (1).

Factors had right to sell goods as incident to their character.

The right to sell was, at all times, incident to the character of a factor, though he had no power to pawn or pledge the goods of his principal, or to deposit them for the purpose of being sold by another (2).

Pledges could only be under express authority.

Until the passing of recent enactments (3) to establish the validity of a pledge, the authority of the principal for that purpose must have been explicitly established. Thus, where goods were consigned to parties in London, with the most extensive authority that could be given to them, as brokers—with power to regulate the time and place of disposal,—the price, and all other particulars incident to sale—and with a stipulation, that the consignors should be at liberty to draw on the factors, by way of advance, thereby estopping themselves from objecting to any mode of sale which the brokers might adopt, in order to reimburse themselves for such advances; it was yet held, that this did not amount to a

(1) *M'Combie* v. *Davies*, 7 East, 7.

(2) *Paterson* v. *Tash*, 2 Str. 1178; *Pickering* v. *Buck*, 15 East, 44; and cases cited *post*, p. 263, *note* (1).

(3) See the "Factor's Act," 6 Geo. 4, c. 94, *post*, p. 266.

sufficient authority to pledge (1). So, of course, the mere circumstance of a principal's drawing bills on his factor, to whom goods were consigned, to be provided for out of the proceeds of such goods, would not authorize the factor to pledge them, for the purpose of raising money to meet the bills. And where the factor had become bankrupt, and a person to whom he had pawned the goods, sold them, it was held, that the principal might recover, as against him, the whole of the proceeds of such sale, in an action for money had and received, although the factor had appropriated part of the money advanced by the pawnee in payment of one of the bills drawn by his principal (2). Nor could a factor pledge the goods of his principal by endorsement and delivery of the bill of lading, any more than by the delivery of the goods themselves, though the endorsees were ignorant that he was a factor (3). And, where a factor had pledged the goods of his principal, the latter might recover the value of them, in trover, against the pawnee, on tendering to the factor what was due to him, without any tender to the pawnee (4).

Principal drawing bills on factor, to be provided for out of proceeds, not sufficient.

Pledge could not be effected by endorsement of bill of lading.

In case of pledge, principal might recover, *in trover*, on tender of what due to factor.

Even the right of the factor, which has been already alluded to, to permit another to hold goods in his name, and as his servant, was qualified by later decisions; and it seems to have been eventually settled that a factor had no power to delegate to another any authority whatever so as to raise any privity between him and the principal, or, consequently, to confer any right, whether of commission, repayment, or lien.

Power to transfer any right whatever doubted.

(1) *Graham* v. *Dyster*, 6 M. & S. 1; *Queiroz* v. *Trueman*, 3 B. & C. 342; 5 D. & R. 192, *S.C.*; and see *Shipley* v. *Kymer*, 1 M. & S. 484; *De Bouchout* v. *Goldsmid*, 5 Ves. J. 211; *Delauney* v. *Barker*, 2 Stark. Rep. 539.

(2) *Gill* v. *Kymer*, 5 Moore, 503; and *S. P. Fielding* v. *Kymer*, 2 B. & B. 639.

(3) *Newsom* v. *Thornton*, 6 East, 17.

(4) *Daubigny* v. *Duval*, 5 Term Rep. 604.

Thus, where plaintiffs, who were foreign merchants, consigned timber to C. and W., their factors, for sale, and the latter being in embarrassed circumstances, and not having funds of the plaintiffs in their hands adequate to pay the freight and duties, proposed to the defendants, who were merchants, that they should take charge of the consignment, and pay the freight and duties upon landing, and sell the same, dividing with the factors the usual commission on such sale; the defendants, who were apprized that C. and W. were mere factors, acceded to these terms, and accordingly paid the freight and duties amounting to £2200, and received the timber. C. and W. having become bankrupts, the defendants wrote to the plaintiffs for instructions, but before they received an answer made sale of part of the timber. An answer then arrived, denying any right of lien on the part of defendants for the advances made; but the defendants notwithstanding sold the remainder. Defendants then claimed to retain the amount of the advances they had made, after deducting a balance of £1200 due from C. and W. to plaintiffs, which, if brought into the account, would, of course, have reduced the debt due to C. and W.; but the court held, that the agreement between the factors and the defendants, the associated consignees, without the authority or knowledge of the consignors, was a breach of duty, and a fraud on the part of the factors, and that the plaintiffs were entitled to recover, without tender of the lien claimed (1); for a principal employs a broker from the opinion he entertains of his personal skill and integrity, and the latter has no right, without notice, to turn his principal over to another, of whom he knows nothing.

(1) *Solly* v. *Rathbone*, 2 M. & S. 298; and see *Cockran* v. *Irlam*, *ibid.* 301 (note); *Schmaling* v. *Tomlinson*, 6 Taunt. 147; *Jackson* v. *Clarke*, 1 You. & J. 216.

Numerous other authorities might be cited (1), in which this power to pledge has been invariably negatived by the court (unless when authorized by the explicit direction of the principal), but the alterations effected by recent statutes have rendered it unnecessary to dwell more largely upon the subject.

Restrictions against power to pledge now removed.

The restriction, at various times, called forth the praise and condemnation of the judges. Its effects were differently regarded—by some, the rule was denominated the best safeguard of the foreign merchant—by others, it was deemed, in a high degree, prejudicial to credit and to commerce; and a well-founded regret was not unfrequently expressed, that persons, having the apparent symbol of property, as the true owners, in respect of others dealing with them in ignorance of their real character, should not at law be considered as such.

Stat. 4 Geo. 4, c. 83.

To remedy therefore the inconvenience experienced, the statute 4 Geo. 4, c. 83, was passed. This act, after reciting, that the law, as it then stood, relating to goods shipped in the names of persons who were not the actual proprietors thereof, and to the deposit or pledge of goods, afforded great facility to fraud, produced frequent litigation, and proved, in its effects, highly injurious to the interests of commerce in general, enacted, that persons intrusted with goods for the purpose of sale, by the persons by whom they were shipped, and other persons in whose names the goods should be shipped, should be deemed the owners, so as to entitle consignees to a lien thereon, and that any person might take goods, or bills of lading in deposit from the consignee, so as to vest in him the same right and interest, as might be enforcible by the consignee, at the time of the deposit; reserving, however, to the real owner of the goods, a right to fol-

(1) See *Kuckein* v. *Wilson*, 4 B. & Ald. 443; *Boyson* v. *Coles*, *ibid.* 14; *Barton* v. *Williams*, 5 B. & Ald. 395; *S.C.* in error, *nom. Williams* v. *Barton*, 3 Bing. 139; *Guichard* v. *Morgan*, 4 Moore, 36.

low them into the hands of the factor or agent, before such deposit; or, in case of his bankruptcy, into the hands of his assignees; or to recover them from the party to whom pledged, on payment of the sum for which the lien legally arose.

Factors' act, stat. 4 Geo. 4, c. 83, amended by 6 Geo. 4, c. 94.

This communication of factors' or agents' rights to third parties was amended, and considerably enlarged, by the stat. 6 Geo. 4, c. 94, entitled "An act to alter and amend an act (1) for the better protection of the property of merchants and others, who may hereafter enter into contracts or agreements in relation to goods, wares, or merchandize, intrusted to factors or agents."

Renders valid contracts with factors having possession of goods, &c.

After enacting, that factors or agents having goods or merchandize in their possession shall be deemed to be the true owners, so as to give validity to contracts with persons dealing *bonâ fide*, upon the faith of such property,

Sect. 2. Factors or agents having bills of lading, &c. of goods in their possession to be deemed the true owners so as to give validity to contracts with persons dealing *bonâ fide* on the faith thereof.

it is enacted by the second section, "that any person or persons intrusted with, and in possession of, any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, wharfinger's certificate, warrant, or order, for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares, and merchandize described and mentioned in the several documents thereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares, and merchandize, or any part thereof, *or for the deposit or pledge thereof, or any part thereof, as a security for any money, or negotiable instrument or instruments, advanced or given* by such person or persons, body or bodies politic or corporate, upon the faith of such several

(1) 4 Geo. 4, c. 83.

documents, or either of them. Provided such person or persons, body or bodies politic or corporate, shall not have notice by such documents, or either of them, or otherwise, that such person or persons so intrusted as aforesaid, is or are not the actual and *bonâ fide* owner or owners, or proprietor or proprietors of such goods, wares, or merchandize, so sold or deposited, or pledged, as aforesaid."

Acceptances of a factor for his principal, which were provided for by the latter before they became due, did not constitute such a demand against the principal, as to enable the factor, previous to this section coming into operation, to pledge the warrants for goods belonging to the principal, as security for advances made to himself (1).

Acceptances of a factor for principal did not before statute enable factor to pledge goods of principal.

And it has been held, that even under the present statute, a person receiving East India warrants from a factor in pledge, cannot retain them against the true owner, if the circumstances be such, that the pledgee may have had reason to suspect that the factor was not the true owner. "The expression of the statute," Lord Tenterden observed, "is, that a party is to be entitled to its protection, if he shall not have notice, by the documents or otherwise, that the pledger is not the actual and *bonâ fide* owner of the goods pledged. A person may have knowledge of a fact, either by direct communication, or by being aware of circumstances which must lead a reasonable man, applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge," continued his lordship, "acquired in either of these ways, is, I think, enough to exclude a party from the benefit of the provisions of this statute. Slight suspicion, I think, will not" (2).

Pledgee not entitled to protection of statute, unless he use reasonable caution.

(1) *Blandy* v. *Allen*, 3 Car. & P. 447.

(2) *Evans* v. *Trueman*, 2 B. & Ad. 866; 1 Man. & R. 10, *S. C.*

Sect. 3. No security to be taken for an antecedent debt, beyond the factor's interest in the goods.

Sect. 3, provides, that if the pledge be taken for an *antecedent debt*, the person so accepting or taking it, though without notice that the person intrusted was not the real owner of the goods, shall not acquire any further right, interest, or security, than the person so intrusted possessed against his principal at the time of the deposit.

Persons receiving pledge for antecedent debt cannot hold proceeds, but will be allowed credit in estimating damages.

Upon this section it has been held that if a person, receiving a pledge from a factor for an antecedent debt, sell it, he cannot hold the proceeds against the real owner, but is liable to him in trover: but, in estimating the damages to which the owner is entitled, credit will be allowed for the balance, if any, due from the owner to the factor. If the pawnee retain the goods, the sum due to the factor ought to be tendered by the owner, but, if he have sold them before demand, such tender is unnecessary (1).

Persons may accept goods in pledge from known agents, but can acquire only the interest possessed by the agent himself.

Sect. 5, enacts, "that it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares, or merchandize, or any such document as aforesaid, in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge, is or are a factor or factors, agent or agents: but then, and in that case, such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title, or interest in, or upon, or to the said goods, wares, or merchandize, or any such document as aforesaid, for the delivery thereof, than was possessed, or could or might have been enforced by the said factor or factors, agent or agents, at the time of such deposit or pledge as a security, as last aforesaid: but such person or persons, body or

(1) *Taylor* v. *Trueman*, M. & M. 453; Lloyd & W. 184, *S. C.*

bodies politic or corporate, shall and may acquire, possess, and enforce such right, title, or interest as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid, any rule or law, usage or custom to the contrary notwithstanding."

Owner of goods may follow them while in the hands of his agent or assignee, in case of bankruptcy, or recover from a third person, on paying advances secured upon them.

Sect. 6, enacts, "that nothing herein contained shall be deemed, construed, or taken to deprive or prevent the true owner or owners, or proprietor or proprietors of such goods, wares, or merchandize, from demanding and recovering the same from his, her, or their factor or factors, agent or agents, before the same shall have been so sold, deposited, or pledged, or from the assignee or assignees of such factor or factors, agent or agents, in the event of his, her, or their bankruptcy: nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from any person or persons, body or bodies politic or corporate, the price or sum agreed to be paid for the purchase of such goods, wares, or merchandize, subject to any right of set-off on the part of such person or persons, body or bodies politic or corporate, against such factor or factors, agent or agents: nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from such person or persons, body or bodies politic or corporate, such goods, wares, or merchandize, so deposited or pledged, upon repayment of the money, or on restoration of the negotiable instrument or instruments so advanced or given on the security of such goods, wares, or merchandize as aforesaid, by such person or persons, body or bodies politic or corporate, to such factor or factors, agent or agents: and upon payment of such further sum of money, or on restoration of such other negotiable instrument or instruments (if any) as may have been advanced or given by such factor or factors, agent or agents, to such owner or owners, proprietor or

proprietors, or on payment of a sum of money equal to the amount of such instrument or instruments: nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his or their hands, as the produce of the sale of such goods, wares, or merchandize, after deducting thereout the amount of the money or negotiable instrument or instruments, so advanced or given upon the security thereof as aforesaid. Provided always, that in case of the bankruptcy of any such factor or agent, the owner or owners, proprietor or proprietors of the goods, wares, and merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him, her, or them, to the estate of such bankrupt."

Fraudulent disposal of goods by a factor, a misdemeanor punishable by transportation.

By this statute, the fraudulent deposit or pledge of goods, or the documents relating to them, by any factor or agent to whom they are intrusted or consigned, with intent to defraud the owner thereof; or the application or disposal of them to his own use, in violation of good faith, with like intent to defraud, is rendered a misdemeanor, and made punishable by transportation; with a proviso, however, that it shall not extend to cases in which the agent has not made the goods a security for any sum beyond the extent of the debt due and owing to such agent from his principal; and with a further proviso, that the acceptance of bills of exchange by such person or persons, drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt, so due and owing from such principal or principals, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid when the same shall respectively become due (1).

Proviso in respect of certain transactions.

(1) 6 Geo. 4, c. 94, ss. 7 & 8.

Sect. 9, enacts, that the penalty annexed to the commission of such offence shall not extend to any partner, not privy or accessary thereto; and sect. 10, that the remedies thereby given shall not prevent or lessen any remedy at law, or in equity, which the party aggrieved may be entitled to adopt.

Punishment not to extend to partners not privy thereto.

In order to constitute a good defence to an action of trover, for goods pledged by a factor or agent, under the power given by the 5th section of the statute, the plea must allege, that the party making the pledge was in possession of them as a factor, so as to bring him within the terms of the statute, or, that he was intrusted with the goods, to sell or to pledge them (1).

In an action of trover for goods pledged by factor, plea must allege that he was such.

Where a broker, having accepted bills for his principal on the security of goods then in his hands, pledged the goods with a person who had notice of the agency, but did not inform the principal of the transaction, it was held, that under the like section, the broker could only transfer such right as he had, which was a right to be indemnified against the bills which he had accepted, and that the principal having satisfied the bills, was entitled to have back his goods from the pawnee, without paying the amount for which they were pledged. The right of the agent in this case, was to an indemnity against the bills of exchange, and had he discharged the bills out of his own funds, his right would have been converted into a lien for money actually advanced. On payment of them by the principal, the broker's right ceases, and becomes void, and the principal is again entitled to the possession of his goods (2).

Broker holding goods as an indemnity, can only transfer the like right.

So, where the plaintiffs consigned goods to their factor, and, at the same time, drew bills upon him for the amount, which he accepted, but which they them-

Sub-agent's authority confined to that of agent.

(1) *Jaullery* v. *Britten*, 4 Bing. N.C. 242; 1 Arn. 58, *S. C.*

(2) *Fletcher* v. *Heath*, 7 B. & C. 517; 1 M. & R. 355, *S. C.*; and see *Blandy* v. *Allen*, 3 Car. & P. 447; Dan. & Lloyd, 22, *S. C.*

selves ultimately paid, and the factor sent the goods to the defendant, with whom he had general dealings, without intimating that they were the property of a third person, and drew a bill upon him for the amount, which the defendant accepted and paid; after which the factor became insolvent, having before that time apprized the defendant that he had received a notice of countermand of the sale from the plaintiffs, but the defendant afterwards sold the goods; it was held that the defendant was liable for the value of the goods, in an action for money had and received, and that he would have been equally liable, had he not known that the goods were the property of the plaintiffs (1).

5th sec. 6 Geo. 4, c. 94, refers to *pledges* only, not to sales.

The 5th section refers, it will be observed, to pledges made distinctly as such. Hence, where a factor, having a lien on his principal's goods, transferred them to a third party, it was held, that the latter was not entitled to hold them against the principal to the extent of the factor's lien, under this section, unless the transfer were made expressly as a pledge (2).

Right to pledge depends upon whether any thing is due from the principal to the factor.

And the right to pledge depends upon the question, whether, upon the face of the whole account between them, the principal is indebted to the factor. Thus, where a factor, by the desire of his principal, kept separate accounts of sales, in some of which the principal was solely, and in others, partly interested, but regularly posted all the items of both those accounts into one general account, and the factor then pledged goods consigned to him on the joint account, for the purpose of meeting a draft drawn on him by his principal against that account. At this time, the factor upon the general account was indebted to his principal in a larger sum than the amount of the draft; but upon the separate

(1) *Jackson* v. *Clarke*, 1 You. & J. 216.
(2) *Thompson v. Farmer*, M. & M. 48.

account, upon which the draft was, and to which the goods pledged belonged, the principal was indebted to the factor; it was held, that the factor had no right to pledge, and that the pledgee could not retain the goods against the principal (1).

Forbearance of owner to claim goods pledged not an acquiescence in pledge.

And where, under such circumstances, the principal, for some time after notice of the pledge, delayed making known that he was the owner, and forbore to demand the goods, it was yet held, that such forbearance was not an acquiescence in, or adoption of the pledge, and that, in the absence of any evidence to show that the effect of such forbearance had been to alter the situation of the pledgee for the worse, or, that of the principal for the better, the right of the principal against the pledgee remained entire (2).

Extends only to documents intrusted to factor by principal.

Where a factor had goods consigned to him, and the bills of lading endorsed, and received the dock warrants and wharfinger's certificates in his own name, which he pledged for advances on his individual account; it was held, that the statute did not extend to documents created by the factor himself, but only to pledges by him of documents intrusted to him by the owner; and that consequently it made no difference that the pledgee knew that the goods were not the property of the factor (3).

BILL-BROKERS.

Bill-brokers.

The law has long been considered to be firmly established that the holder of bills of exchange endorsed in blank, or other negotiable securities transferable by delivery, could give a title which he himself did not possess to a *bonâ fide* holder for value. But this rule has

(1) *Robertson* v. *Kensington*, 5 Man. & Ry. 381.
(2) *Ibid.*
(3) *Close* v. *Holmes*, 2 M. & Rob. 22.

been departed from in some cases where care and caution in the taker of such securities has been treated as essential to the validity of his title besides, and, independently of, honesty of purpose (1), and this particularly in transactions with bill-brokers.

Nature of employment regulated by usage.

In the absence of any particular evidence as to the nature of a bill-broker's employment, he must be taken to be an agent to procure the loan of money on each customer's bills separately. His character is not however known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing. It may differ in different parts of the country, and may have powers more or less extensive in one place than another; what is the nature of its powers and duties, in any instance, is a question of fact, and is to be determined by the usage and course of dealing in the particular place (2).

Cannot pledge the bills of customers in a mass; but particularly for debts antecedently due.

Hence, in the absence of particular usage, a bill-broker who receives a bill merely for the purpose of procuring it to be discounted for his customer, has *by law* no right to mix it with bills of his other customers, and to pledge the whole mass as a security for an advance of money; for the consequence of this would in many cases be, that the bills of one customer might be detained for a loss arising from the dishonoured bills of other customers; much less can he deposit them as a security, or part security, for money previously due from him (3). And any person knowing, or having reasonable cause to suspect or believe, the limited authority of the broker making the pledge, takes the bills at his peril, and cannot hold them against the customer (4).

But this rule may be affected

But, as observed, the general rule of law may be

(1) *Foster* v. *Pearson*, 1 Cr. M. & R. 855, per Parke, B.
(2) *Ibid.* 888.
(3) *Haynes* v. *Foster*, 2 Cr. & M. 237.
(4) *Ibid.*

varied by proof of a custom, or more properly speaking, an usage in a particular place, authorizing such general pledge, and the inconvenience attendant on the possibility of the owner of one bill having to provide for the payment of another has been answered by the counterbalancing advantage derived from the greater facilities afforded for raising money on negotiable paper, inasmuch as a great capitalist will advance money in this way, who will not discount each particular bill (1). Thus in the case following, which arose out of the same transaction as the one referred to above, evidence of such general usage in London was adduced, and put to the jury to infer a general notoriety. by particular custom or usage.

Messrs. Wood and Poole, brokers in London, had in their possession bills of different customers, to the amount of nearly £3,000, which had been left with them to raise money upon. They mixed these bills with others of their own to about the same amount, and deposited the whole with F., who was a merchant and capitalist, for an advance of £3,000, then made, and for a preceding advance made a few days before, on a promise to bring bills. Evidence was given, that it was usual and customary for bill brokers *in London* to raise money by a deposit of their customers' bills in a mass, and that the bill-broker alone was looked to by the customer, who gave the bill-broker dominion over the bills. In an action brought by F. on one of the bills, against one of the customers, who was a party to the bill, the judge left it to the jury to say, whether F., the plaintiff, took the bills from W. and P., the bill-brokers, with due care and caution, and in the ordinary course of business, and the jury being of opinion that he had so taken the bills, found a verdict for the plaintiff, and the court refused to disturb the verdict (2).

(1) *Foster* v. *Pearson*, 1 Cr. M. & R. 859, per Parke, B.
(2) *Ibid.*

Though, therefore, the principle laid down regarding the invalidity of a bill-broker's power to mix the bills of his various customers, and to pledge them in a mass (1) as security for advances, but particularly for a debt antecedently due from them, must be taken as the general law; parties may contract as they think proper, and it must be left to the jury to say, whether the usage set up as to the course of dealing in such cases be established to their satisfaction, and, if so, whether they think that the parties have contracted with reference to that usage (2).

SHIP-BROKERS.

Ship-brokers having papers in possession, may receive debt due from ship-owner, on delivering them up, though he has committed an act of bankruptcy, on which fiat afterwards issues.

Where a master and part-owner of a vessel, consigned her to the defendants, who were ship-brokers, on the usual terms of commission, on which the ship's papers were handed over to them, and they made disbursements on his account; and afterwards he was arrested, and lay in prison more than two months; on which a commission was issued against him, and the plaintiffs were appointed his assignees; and whilst he was in prison, the defendants adjusted their account with him, respecting their disbursements, and at the same time delivered to him the ship's papers; it was held, that in an action brought by the assignees, for the recovery of such balance, they were not entitled to recover, as the defendants had a lien on their papers, until their account was adjusted and paid; and that neither the bankrupt, nor his assignees, could have disposed of the ship before the papers were given up (3).

(1) *Haynes* v. *Foster*, 2 Cr. & M. 237.
(2) *Foster* v. *Pearson*, 1 Cr. M. & R. 849; 5 Tyr. 255, *S. C.*
(3) *Thompson* v. *Beatson*, 7 Moore, 548; 1 Bing. 145, *S. C.*

INSURANCE-BROKERS.

Insurance-brokers have a lien for the general balance due to them from their employers, not only upon the policies in their hands, but upon all monies received upon them (1). It has been, however, held, that where the broker has notice that the person who employs him is himself an agent, the rights of the principal shall not be affected by the state of accounts between the other two (2); in other words, that a person thus employed as sub-agent, cannot acquire the broker's general lien (3). In such case, it has appeared that the party effecting the insurance had notice, that the person employing him was an agent, and not the principal. In a later case (4), Lord Ellenborough carried this restriction yet further, and was of opinion, that in transactions of this sort, if an agent represent himself to have a power which is not intrusted to him, his principal is not bound by his acts; and the person who gives faith to the representations of the agent, must run the risk of their being true or false; and therefore limited the liability of the principal to the premiums and other charges upon the particular policy. The doctrine maintained by Lord Ellenborough would seem, however, to have contravened a principle acted upon in numerous earlier authorities. In the case of *Rabone* v. *Williams* (5), Lord Mansfield, C. J., observes, "Where a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right

Insurance-brokers have a general lien.

(1) *Whitehead* v. *Vaughan*, Cooke, 579; *Parker* v. *Carter*, *ib.* 573, 8th edit.

(2) *Mannes* v. *Henderson*, 1 East, 335.

(3) *Snook* v. *Davidson*, 2 Camp. 218.

(4) *Lanyon* v. *Blanchard*, 2 Camp. 597; and see *Richardson* v. *Goss*, 3 Bos. & Pul. 119; *Pultney* v. *Keymer*, 3 Esp. Rep. 182.

(5) 7 Term Rep. 360, note (*a*).

to consider him, to all intents and purposes, as the principal; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet the purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. This has been long settled." It was also held by Lord Kenyon, C. J., upon the like principle, that where goods were intrusted by the owner to another person, in order to have them printed, and that person delivered them to a calico-printer, *as his own*, for that purpose, the calico-printer might retain them against the owner, for a general balance due from the person who delivered them (1). And, in a yet more recent case, Lord Ellenborough seems himself to have admitted the lien of brokers for their general balance, under similar circumstances. "They must be supposed," his lordship observes, "to have made advances on the credit of the policy, which was allowed to remain in their hands; therefore they had a right to satisfy their general balance from the money received under the policy, whether *before or after the notice communicated* to them of the principal's interest" (2). But subsequent to such notice, the excess, after satisfaction of the broker's balance, must be paid over to the principal (3).

The cases which I have cited in favour of and against the general lien of the broker, under these particular circumstances, seem to have been fully reviewed, and that of *Mann* v. *Forrester* (4), to have been established, by the decision of Gibbs, C. J., in *Westwood* v. *Bell* (5), where his lordship held, that if a policy of insurance be

(1) *Weldon* v. *Gould*, 3 Esp. Rep. 268; but see *post*, tit. "Dyers, Calico-Printers and Bleachers."

(2) *Mann* v. *Forrester*, 4 Camp. 60; and see *George* v. *Claggett*, 7 Term Rep. 359.

(3) *Mann* v. *Forrester*, 4 Camp. 60.

(4) *Suprà*.

(5) 4 Camp. 349.

effected by a broker, in ignorance that it does not belong to the persons by whom he is employed, he has a lien upon it for the amount of the balance they owe him. The only question is, whether he knew, or had reason to believe, that the person by whom he was employed was only an agent; and the party who seeks to deprive him of his lien, must make out the affirmative. The employer is to be taken to be the principal, till the contrary is proved. The current of authorities may be considered, therefore, to have settled the question as to such general lien in favour of the broker, where no express or implied notice can be shown to have been received by him, of the mere agency of the party for whom the insurance is effected. And this principle is even stronger in the case of an agent who acts under a *del credere* commission, and directs policies to be effected, as for himself, where the broker is entitled to retain the policy in his hands, or any money received from the underwriters upon it, for the general balance as between him and the agent (1).

Assignee of policy takes it subject to lien of broker.

If a broker be directed by his foreign correspondent to effect a policy of insurance upon goods on their homeward passage, which is accordingly done, and another becomes afterwards the assignee of the policy, by endorsement to him of the bill of lading of the goods by the consignor, he takes it subject to the lien of the broker, for the general balance due from the consignor, and can only claim, subject to that lien, the money received on such policy by the broker. But the broker has no sub-lien on the policy for the general balance of his own account with such correspondent, if he knew, *at the time*, that the policy was effected for another person (2).

(1) See observations on the analogous case of *George* v. *Claggett*, 7 Term Rep. 359, in note to *Snook* v. *Davidson*, 2 Camp. 220.

(2) *Mann* v. *Shiffner*, 2 East, 522.

Parting with policy.

Though a broker part with the possession of the policy, he has still a lien on its being re-delivered to him, for the amount of premiums which may be unpaid (1). But where the plaintiff being resident abroad, ordered B. & Co., in London, to effect an insurance on his account; who, not being in the habit of effecting their own insurances, or those of their correspondents, delivered the order to the defendant, being their broker; who accordingly effected it in their names, and handed over the policy, and debited them with the premiums: the plaintiff paid the amount of these premiums to B. & Co., without the defendant's knowledge, and a loss being subsequently claimed by the plaintiff, the policy was re-delivered by B. & Co., to the defendant (the broker), for the purpose of his procuring an adjustment. There was an open account between the defendant and B. & Co.; and, in 1813, they were indebted to him in 21,000*l.* in such open account, *including the premiums in question.* In 1814, they paid him 33,000*l.*, on account of losses, and returns on insurances effected for them; and in the latter part of that year the defendant was a considerable creditor on such account; it was held, that, as the premiums might be included in the settlement of account, the defendant was not entitled to retain the policy, either for premiums or for his general balance (2). The distinction taken in this case was, that when the policy was returned to the defendant, he knew that the plaintiff was the owner.

No lien, if policy deposited for a special purpose.

As, in all other cases, the general lien of a broker does not attach, if the policy be left in his hands for some specific purpose. Thus if, after he has taken it into his custody, for the purpose of safe-keeping only, he advance money to the assured, without any other security than the policy, he acquires no general lien on the instru-

(1) *Levy* v. *Barnard*, 2 Moore, 34; 8 Taunt. 149, *S. C.*
(2) *Ibid.*

ment for such advances; but it would, of course, be otherwise, if it were left with him as a security generally (1).

Actual payment of premiums, by the broker, is not a condition precedent of his right to lien. By the custom of Lloyd's, premiums of insurance are matters of account between the underwriter and the broker, and between the broker and the assured, without any privity between the underwriter and the assured. The broker has, therefore, a claim upon the assured, for the amount of the premium as soon as the policy is effected, whether he has paid the underwriter or not; and whether the underwriter has, by the policy, confirmed the premium to be paid, or has taken the covenant of the broker to pay it (2).

Actual payment of premiums by broker not necessary to establish right of lien.

If security be taken for payment of the broker's demand, or if he give credit till a distant day, or accept a bill of exchange in liquidation of his debt, which bill is not due nor dishonoured, it is clearly settled that he waives his lien (3).

Credit given, or security taken, for payment at a distant day, defeats lien.

A broker who has effected a policy, and has a lien on it for his premiums, may be compelled, on *subpœna duces tecum*, by the assured, to produce it, on the trial of an action against the underwriters; and he is a competent witness (notwithstanding his lien) to prove all matters connected with the policy. The policy being brought into court, it would work great inconvenience, observed Lord Tenterden, C. J., and enable brokers to assist underwriters in defeating the just claim of the assured, if they were allowed to withhold it. He has a mere lien; and an attorney, although he has a lien on the judgment, is competent; and the reason of the rule is that, whatever be the result of the action, his legal rights remain the same (4).

May be a witness to prove matters connected with policy, notwithstanding lien.

(1) *Muir* v. *Fleming*, 1 D. & R. 29.
(2) *Power* v. *Butcher*, 5 Man. & Ry. 327.
(3) *Hewison* v. *Guthrie*, 2 Bing. N. C. 755; 2 Hodges, 51, *S. C.*
(4) *Hunter* v. *Leathley*, 10 B. & C. 858.

CHAPTER XVII.

COMMON CARRIERS BY LAND.—COMMON CARRIERS BY WATER.

COMMON CARRIERS BY LAND.

Common carriers bound to convey goods when required.

COMMON carriers, by the custom of the realm, are bound to carry the goods of a subject for reasonable reward, unless their carriage be already full, or the risk sought to be imposed upon them be extraordinary, or the goods be of such a nature as they cannot convey, or are not in the habit of conveying; and in case of refusal, are liable to an action (1).

Have only a particular lien, unless general lien be established by common usage.

It would not have been unreasonable, therefore, to have expected that in their case, a more favourable and extended construction would have been put upon the doctrine of lien than the law recognizes. On the contrary, the lien of a common carrier for his general balance is never favoured, unless arising in point of law from an implied agreement to be inferred from the general usage of trade, proved by clear and satisfactory instances, sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm; and a few recent instances of such usage amongst the body are insufficient to establish the requisite proof of it (2). The evidence must be such as to warrant a conclusion that the parties contracting with the carrier

(1) *Jackson* v. *Rogers*, 2 Show. 327; *Lane* v. *Cotton*, 1 Ld. Raym. 646; *Edwards* v. *Sherratt*, 1 East, 604; *Riley* v. *Horne*, 5 Bing. 217; *Batson* v. *Donovan*, 4 B. & Ald. 21.

(2) *Rushforth* v. *Hadfield*, 6 East, 518; 2 Smith, 624, *S. C.*; *Whitehead* v. *Vaughan*, *ib.* 523 (*note*); *Holderness* v. *Collinson*, 7 B. & C. 212; 1 Man & Ry. *S. C.*

must have a knowledge of the usage. Thus where the common carriers of a particular district had for ten or twelve years, or even, in one instance, for thirty years past, exercised such general right, it was held insufficient proof (though unopposed by other testimony), and the jury having upon such evidence negatived the general usage, the court refused to grant a new trial (1). The claim of carriers to a lien for their general balance has been considered by the courts as contrary to the policy of the common law, and the interest of trade, and by no means necessary for the convenience of the carriers themselves; but it has been at the same time always admitted, that either the general usage of trade, if notorious, uniform, and long-established, or the previous usage of the parties between themselves, if clearly proved, would be sufficient evidence of a contract for a general lien (2).

Claim to lien for general balance discouraged.

Hence, carriers have in many instances endeavoured to secure to themselves a general lien, by promulgating a public notice to that effect, or by express stipulation with their customers. Such latter agreement would be, no doubt, binding and conclusive between the parties, and the goods of a customer cognizant of the notice, might in such case be detained for a general balance due from him. But where a carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular articles, but also for any general balance due from their respective owners; and goods were sent by a carrier, addressed to the order of J. S., who was merely a factor, it was held that the carrier had no lien, as against the real owner for a balance due from J. S. (3).

Have endeavoured to secure a general lien by notice.

Such notice will not affect interest of third parties.

Doubts have been entertained how far this decision

Suggestions for

(1) *Rushforth* v. *Hadfield*, 7 East, 224; 3 Smith, 221, *S. C.*

(2) See *Aspinall* v. *Pickford*, 3 Bos. & Pul. 44 (*n*).

(3) *Wright* v. *Snell*, 5 B. & Ald. 350.

a more comprehensive notice.

might have been affected had the notice been more comprehensive in its terms, and included the goods, not only of the respective owners, but of every person, to whomsoever addressed; and whether, in such case, the carrier might not have been entitled to a general right of detention against all parties.

With the view to enable such enlargement of power, Mr. Chitty, in his Practice of the Law (1), has suggested the expediency of introducing words to the effect, "that the goods of all persons dealing with the party in his trade, and whether belonging to the customer, *or to any other person or persons, or in which he is in any respect interested,* whether for a lien or otherwise, or which may be in the possession of the advertiser, or whether going to or from his manufactory or premises, must be understood to be, and will be, subject to a general lien for all moneys due to the advertiser, as well from the customer, as from any person or persons entitled to or interested in such goods." Yet to grant the validity of so extensive a claim would be to allow, by special agreement, a power against third parties not recognised by the courts, even though sanctioned by immemorial custom (2); for to give validity and effect to usage, it has been decided that it must be reasonable as well as ancient, and it can scarcely be contended that the detention of the goods of the consignor for the debt of the consignee, is either just or reasonable (2). The principle of such decision should, therefore, and probably would, regulate the judgment were the question suggested to come before the court. The precautionary measures proposed in the form of notice may, at least, be pursued, *majori cautelâ;* but, to permit the annexation of terms so inconsistent with the general principle, that carriers are compellable to carry

Doubts if such notice would be effectual.

Would be decided by the analogous rule that a custom to be valid, must be reasonable.

(1) Vol. 1, p. 493.

(2) *Leuckhart* v. *Cooper*, 3 Bing. N. C. 99; 2 Hodges, 150, *S. C.*

the goods of all customers, for reasonable reward, would, at once, be an abrogation of the rule, and a permissive power vested in carriers, which immemorial custom has not been able to establish in others. "I should doubt," observed Best, J. (1), in a similar case, "if any form of words would be able to establish a liability of such kind. It is however sufficient, in the case before the court, to say, that the plaintiff is the owner of the goods, and there being nothing due from him to the carriers, the words of the notice do not impose any liability upon him. If any question should arise falling within the terms of the notice last given (2), *it would be very fit to consider whether a carrier can make so unjust a regulation as is there attempted.*"

Best, J., doubts the validity of so extensive a notice.

When a similar attempt was made by a carrier to detain the goods of a consignor for the general balance due to him from the consignee, and evidence was tendered to prove the publication of notices to that effect, the claim was decided to be inoperative as against the common law right of the consignor to stop the goods *in transitu* (3). The delivery to the carrier is a qualified, not an absolute delivery, to the consignee, and good to all intents and purposes, except that of defeating the right of the consignor to stop them *in transitu*. It is such as to give the latter a right of resuming possession at any time before the goods come into that situation which gives the consignee a complete dominion over them. At common law, therefore, a carrier is only authorized to detain goods delivered to him for conveyance, until the price of the carriage of those particular

Attempt to claim goods of consignor for debt of consignee, held bad.

At common law only a specific lien.

(1) *Wright* v. *Snell*, 5 B. & Ald. 355.

(2) The notice alluded to was, that all goods, from whomsoever received, or to whomsoever belonging, should be subject to a lien not only for the freight of the particular goods, but also for any general balance that might be due from the person to whom they were consigned or addressed.

(3) *Oppenheim* v. *Russell*, 3 Bos. & Pul. 42.

Who are carriers.

goods is paid (1); and this rule is applicable to all persons who carry indifferently for hire, as masters of ships, lightermen, hoymen, and proprietors of waggons, who come under the denomination of common carriers (2). So the proprietor of a stage-coach, taking a distinct price for the carriage of goods (3), but not a hackney-coachman. Nor is the Postmaster-General a common carrier within the custom of the realm (4).

Lien of coach proprietors on luggage, for coach hire.

If a person go into a coach-office, and direct that a place be booked for him by a particular coach, and that be done, and he leave his portmanteau; the coach proprietor will have a lien on the portmanteau for something, but not for the full amount of the coach fare; but if the party merely leave the portmanteau, while he goes to enquire if there be an earlier coach, and no place be actually booked, the coach proprietor has no lien at all (5).

Carriers need not inquire the title of customer to the goods conveyed.

The obligation of carriers to receive and convey goods for hire, exempts them, as in the case of innkeepers, from any necessity to inquire into the title of the parties delivering them, and for this reason, they may detain them against the true owner until the particular carriage be paid, though the latter should prove that they were stolen from him by the person who delivered them to be carried (6). It must, however, be a detention only for the amount actually incurred for carriage. Thus, where goods are taken by the owner from the waggon, the carrier or warehouseman has no claim for booking or

Lien can only be for actual carriage.

(1) *Skinner* v. *Upshaw*, 2 Lord Raym. 752; *Rushforth* v. *Hadfield*, 6 East, 518; 7 East, 224.

(2) *Gisbourn* v. *Hurst*, 1 Salk. 249.

(3) *Middleton* v. *Fowler*, 1 Salk. 282.

(4) *Lane* v. *Cotton*, 1 Lord Raym. 646; *Whitfield* v. *Lord Le Despencer*, Cowp. 754.

(5) *Higgins* v. *Bretherton*, 5 C. & P. 2.

(6) *Yorke* v. *Grenaugh*, 2 Lord Raym. 867, per Lord Holt, C. J.

warehouse-room, and there is consequently in such case no right of lien (1).

The privilege of lien may be limited, as well as extended, by special usage; as, for instance, where, by the custom of a particular trade, a carrier is to be paid for the carriage of goods by the consignor, he has no right to detain them against the consignee, who has paid the price of them, for the carriage of other goods of the same sort sent by the consignor (2).

Where custom is for carrier to be paid by consignor, no lien exists against consignee.

The general rule, that a lien is defeated by delivering up possession of the goods after the lien has attached, is applicable to carriers to the same extent as in other cases.

Delivering up possession defeats lien.

COMMON CARRIERS BY WATER.

The rights and liabilities already defined in reference to common carriers by land, extend also to the owners and masters of general ships (3) and vessels, carrying goods for hire on the high seas; or on navigable rivers and canals, as hoymen and lightermen, who are common carriers by the custom of the realm, and being under the same obligation, and subject to the same responsibility by the common law, as carriers by land (4), are entitled by that

Rights and liabilities of carriers by land, extend to owners and masters of ships.

(1) *Lambert* v. *Robinson*, 1 Esp. Rep. 119.

(2) *Butler* v. *Woolcot*, 2 New Rep. 64.

(3) By the term general ship, is meant a ship which is employed by the masters or owners of it to convey the goods of various merchants unconnected with each other to the place of their destination, and the term is here used in contradistinction to a chartered ship, which is employed under a sealed instrument called a charter-party. Abbott on Shipping, p. 112, 215; see *post*, chap. 18, generally as to ship captains, masters, &c.

(4) *Cogge* v. *Bernard*, 2 Lord Raym. 918; 1 Ventr. 238; Jones on Bailment, 106; Abbott, p. 249. The responsibility of carriers by water stood on the same footing at common law as that of carriers by land: both being alike responsible for every damage but that which accrued by the act of God and the king's enemies. Abbott, p. 223. Both, however, have succeeded

law to the same particular lien for the price of the carriage of the goods delivered to them, in the course of their trade.

Right of lien allowed by most maritime codes.

The right of retaining possession of the cargo, until the freight of the ship was discharged, appears to have been allowed to the master by most of the maritime codes of Europe. By the civil laws, as well as by those of Oleron, he is entitled to detain the cargo until pay-

in altering the situation in which the common law had placed them; the latter by special notices, the legality of which seems now to be clearly established, and the former by introducing clauses into the bills of lading to take away the responsibility of the masters and owners in various cases in which they would otherwise be responsible. Besides this, the legislature has thought proper so far to accede to their wishes, as entirely to take away the liability of the owners in cases of damage by fire; 26 Geo. 3, c. 86, s. 2, and to limit it to the value of the ship and freight in case of embezzlement or robbery, 7 Geo. 2, c. 15; 26 Geo. 3, c. 86, s. 1; and to discharge both the *master* and owners from any responsibility for any gold and silver, diamonds, watches, jewels or precious stones, unless the shipper declare the true nature thereof to the master or owners by the bill of lading, or otherwise in writing, 26 Geo. 3, c. 86, s. 3; but except in this last case, the liability of the *master* remains the same as at common law, unless varied by a special contract, Abbott, p. 265. The justice of admitting common carriers to limit their responsibility, when the true value of the goods intrusted to them is concealed by the owner, is obvious, when it is considered that (except in the cases just mentioned) they are liable for unavoidable accidents, and that by requiring a declaration of the value of the goods, as the condition of their responsibility, they do not in fact decline the obligation which the law has imposed upon them, of carrying for *reasonable reward*, but only secure themselves from being defrauded of a reward which is reasonable and adequate to the risk they incur; and when it is recollected, too, that a carrier was never considered as liable to any greater extent than the value of the goods as represented to *him* by the bailor. Carth. 485. Whit. on *Lien*, p. 97.

The existing enactments were, however, yet found to be insufficient to afford proper protection to shippers, and accordingly the more comprehensive statute 53 Geo. 3, c. 159, was passed, incorporating and extending the provisions of earlier statutes with respect to all vessels, save such as are used solely on rivers or inland navigation, or are not duly registered according to law.

The 1 W. 4, c. 68, has been also subsequently passed, limiting the responsibilities of carriers *by land*.

ment is made of the freight and other charges, such as primage and average due in respect of it. The same privilege was given to him by the maritime ordinances of France (1). According to our law, whether the ship be a chartered or a general ship, the master is not (unless there be an express stipulation that he shall be) bound to part with the possession of any part of his cargo, until the freight and other charges due in respect of such part are paid (2). It has been held too, that he may detain any part of the merchandize for the freight of all that is conveyed to the same person (3). But where the time and manner of the payment of the freight are regulated by express stipulations in the charter-party (which is frequently the case), the payment can only be enforced by proceeding on the charter-party (4). Nor can the master detain the goods *on board the ship*, until these payments are made, as the merchant would then have no opportunity of examining their condition (5).

Where time and manner of payment regulated by charter-party.

This right of lien is not confined to freight and merchandize, but extends also to the luggage of a passenger, for the recovery of his passage-money, though the master has no lien on the passenger himself, or the clothes which he is actually wearing when about to leave the vessel (6).

On luggage of a passenger.

According to the principle by which all liens by the common law are regulated, if the master once voluntarily part with the possession of the goods out of his own or his agent's hands, he loses his lien upon them, and cannot afterwards reclaim them (7).

Parting with possession defeats lien.

(1) Abbott on Shipping, 244.

(2) *Ibid*, 276; Anon. cases, 12 Mod. 447, 511; *Artaza* v. *Smallpiece*, 1 Esp. Rep. 23.

(3) *Soldergreen* v. *Flight*, cited 6 East, 622.

(4) Abbott, 246.

(5) Abbott, 245; but see *Artaza* v. *Smallpiece*, 1 Esp. Rep. 23.

(6) *Wolf* v. *Summers*, 2 Camp. 631; and see title "Innkeeper," *post* Chap. 21, *Sunbolf* v. *Alford*, 3 Mee. & W. 248; 1 Horn & Hurl. 13, *S. C.*

(7) Anon. 12 Mod. 511; *Artaza* v. *Smallpiece*, 1 Esp. Rep. 23; Abbott,

When delivery of part does not defeat lien on remainder.

Where, however, several parcels of goods belonging to one owner, are carried the same voyage, a delivery of part does not defeat a lien upon the remainder, for the whole freight. But if there be two contracts to carry, with different *termini* to the voyage in each contract, no lien attaches for freight under the one contract, upon goods shipped under the other, and improperly detained on board by the carrier (1); for in this, as in all other cases, no lien can be acquired by a wrongful possession. No lien therefore attaches if the goods directed to one place be improperly carried on to another.

If possession lost by fraud, lien revives on recovery.

At all times a complete delivery divests the lien (2). But if the possession be put an end to by fraud, the lien revives if possession be recovered (3).

Wharfinger may in some cases be considered as agent of ship-master for the purpose of possession.

There is this exception also to the general rule, that where the possession of goods has been abandoned, the lien is gone. Where the master of a ship, in obedience to revenue regulations, lands goods at a particular wharf or dock, he does not thereby lose his lien on them for the freight (4); and where they are not required to be landed at any particular dock, the common practice is to land them at a public wharf, and direct the wharfinger not to part with them till the charges upon them are paid (5). In such case, the wharfinger becomes the ship-master's agent, and the goods remain in the con-

246. In the case of *Soldergreen* v. *Flight*, cited *Hanson* v. *Meyer*, 6 East, 622, the captain of the ship was allowed a lien on a part of the cargo, which had been removed into a lighter alongside of the ship sent by the vendee, and which the captain afterwards fastened to the ship's side, to prevent its final removal.

(1) *Bernal* v. *Pim*, 1 Gale, 17.

(2) *Ibid.*

(3) *Wallace* v. *Woodgate*, R. & M. 193.

(4) *Wilson* v. *Kymer*, 1 M. & S. 157; In *Ward* v. *Felton*, 1 East, 507, Lord Kenyon doubted whether the captain parted with his lien under such circumstances.

(5) Abbott on Shipping, p. 248.

structive possession of the latter. So, if placed according to the regulations in the East India Company's warehouses, or the East India or West India Company's Dock warehouses, the ship-master may give notice to those bodies to detain the goods till the freight be paid (1).

CHAPTER XVIII.

SALVAGE.—SHIP-CAPTAINS, MASTERS, &c.—SHIPOWNERS. — SHIP-CARPENTERS, OR SHIPWRIGHTS. — SEAMEN, MARINERS, &c.

SALVAGE.

Salvage entitles salvor to lien.

PRINCIPLES of public policy have dictated to civilized and commercial countries, not only the propriety, but the absolute necessity, of establishing a liberal recompense for the encouragement of those who engage in the dangerous service of saving goods exposed to the perils of sea; and our law has provided, that this recompense shall be a lien upon the goods which have been saved (2). But a mere finding and taking care of the thing found, or even the expenses sustained in such preservation, as in the keep of a horse or dog, will not entitle the finder to such right (3).

Contrà, a mere finding.

This right of retention appertains as well to the salvor

(1) *Horncastle* v. *Farran*, 3 B. & Ald. 497; and see East India Company's Act, 54 Geo. 3, c. 228, s. 18. The London Dock Act, 45 Geo. 3, c. 58, s. 15, expressly reserves the lien for freight; and by 6 Geo. 4, c. 107, s. 134, if goods are landed, and sold by the officers of the customs, the freight not having been paid, the produce of the sale is applicable in the first place to its liquidation.

(2) Per Eyre, C. J., *Nicholson* v. *Chapman*, 2 H. Bl. 254; *Baring* v. *Day*, 8 East, 57; *Richardson* v. *Campbell*, 5 B. & Ald. 203 (*note*).

(3) *Ibid.*; and see *Bucks* v. *Bristead*, 2 Bl. 1171.

as to a tailor, an ostler, or a common carrier (1), and the compensation to which he is entitled, if the parties cannot agree upon it, may be ascertained by a jury in an action brought by the salvor against the proprietor of the goods; or the proprietor may tender to the salvor such sum of money as he thinks sufficient, and upon refusal to deliver the goods, bring an action of detinue or trover against the salvor; and if the jury think the sum tendered sufficient, he will recover his goods or their value, and the costs of his suit (2).

In what case salvage may be claimed.

A ship, being in danger, and the captain and part of the crew having made their escape, a passenger, at the request of the rest of the crew, took the command, and brought the ship safe to port. The merits of the passenger, in saving the ship, were acknowledged by the owner in a letter to one of the underwriters, wherein he expressed a desire to make him a compensation. Under these circumstances, it was held that the passenger was entitled to salvage (3).

Finding a quantity of timber washed up and left at low water does not entitle to salvage.

But, where a quantity of timber having been placed in a dock on the bank of a navigable river, was accidentally loosened and carried by the tide to a considerable distance, and being left at low water on a towing-path, was found by a person in that situation, and voluntarily conveyed by him to a place of safety, beyond

(1) *Hartfort* v. *Jones*, 1 Ld. Raym. 393; 2 Salk. 654, *S. C.*

(2) Abbott on Shipping, 398. In some cases the *quantum* of compensation is adjusted by the Court of Admiralty, as where the salvage is performed at sea, or between high and low water mark; and in other cases by special acts of parliament; the 12 Anne, stat. 2. c. 18, which is confined to salvage by or *under the direction of certain public officers:* the 26 Geo. 2, c. 19, extending the provisions of the last-mentioned statute, and providing for cases of assistance voluntarily rendered by persons not employed for that purpose; the 48 Geo. 3, c. 130, ss. 21, 22, providing for cases of assistance given at the request of the persons belonging to the ship without the intervention of the public officers. And see the 1 & 2 Geo. 4, chaps. 75 & 76; the 6 Geo. 4, chap. 105; and the 3 & 4 W. 4, c. 52, s. 49.

(3) *Newman* v. *Walters*, 3 Bos. & Pul. 612.

the reach of high water; it was held, that he had no lien on the timber for the trouble or expense to which he had put himself in the carriage of it, but was liable to an action of trover, unless he delivered it up, on demand, though nothing was tendered him by way of compensation (1).

Nor possession of ship taken by lord of manor when owner's servants present.

The lord of a manor is not entitled to salvage for taking, against the consent of the owner, and preserving, parts of a ship thrown on his manor, when the servants of the owner are there to take care of it for him (2).

SHIP-CAPTAINS, MASTERS, &c.

Captains and masters of ships may hypothecate their vessels for necessary expenses abroad;

The peculiar powers vested in captains and masters of ships, for indemnifying themselves against the necessary expenses and repairs of their vessel, while on a foreign voyage or abroad, are denominated hypothecation. This imports a pledge, without immediate change of possession, and gives a right to the party who makes advances upon the faith of it, to have possession if his advances be not repaid at the stipulated time; reserving however the power of making such repayment, and thereby freeing the subject of the pledge from the obligation. It does not amount to an actual transfer of the ship, but gives to the person furnishing necessaries or doing repairs, a privilege or claim thereupon, to be carried into effect by legal process in the Court of Admiralty (3), which exercises a peculiar jurisdiction *in rem* against the ship itself, while that of the courts of common law (except in particular instances of forfeiture, &c.) is exercised by suit against the person only (4).

(1) *Nicholson* v. *Chapman*, 2 H. Bl. 254.

(2) *Sutton* v. *Buck*, 2 Taunt. 302.

(3) *Johnson* v. *Shippen*, 2 Lord Raym. 984; *Johnson* v. *Greaves*, 2 Taunt. 344.

(4) *Menetone* v. *Gibbons*, 3 Term Rep. 267.

But not for repairs, *infra corpus comitatûs*, or in England:

The right to hypothecate does not however extend to any port *infra corpus comitatûs*, or where the contract for repairs, &c., is in England (1); though it has been held to be exercisable within a port in Ireland (2); and Jersey and Guernsey have also been held to be foreign countries for this purpose (3).

Nor can they bind the person of the owner.

Nor can the master of a vessel bind the owner personally, in addition to the pledge or hypothecation of the ship and freight, though such excess of his authority would not actually invalidate the efficacy of that part of the pledge which has acknowledged operation (4).

Pledge of ship extends to cargo in case of necessity.

But the power to pledge the ship extends equally to the cargo, *in case of necessity;* and the hypothecation, in such case, has been held to be available against the shippers after exhaustion of the ship and freight (5).

Purpose of hypothecation.

The purpose for which hypothecation has been allowed, is to meet those emergencies to which masters of vessels are exposed in the course of navigation, arising from the very necessity of the case, and the difficulty of communication between them and the owners. It is confined therefore to those liabilities for which the owners themselves are strictly answerable; and is justified by the consequences that might otherwise ensue to them, by the abandonment or loss of their ships.

Cannot hypothecate for any personal debt;

The master of a ship cannot, by any instrument of hypothecation, charge it for a debt of his own. The attempt would be a fraud in him, and those who should aid him to do so would be parties to the fraud; and therefore the fairness of the loan may be made the subject of inquiry and contest, if justice require it. But provided the ship have been in a state of want, and the

(1) *Buxton* v. *Snee*, 1 Ves. Jen. 154.
(2) *Menetone* v. *Gibbons*, 3 Term Rep. 267.
(3) *Hussey* v. *Christie*, 13 Ves. J. 599; 9 East, 426, *S. C.* in K. B.
(4) *Re Nelson*, 1 Hag. Adm. Rep. 176.
(5) "*The Jacob*," 4 Rob. 245.

money fairly advanced to the master, his subsequent misapplication of it will not deprive the lender of the benefit of his security (1).

But the master may hypothecate his ship, or sell any part of the cargo, for the purpose of paying salvage; and in the case of capture, and recapture, in the absence of the captain, the like power would vest in the mate, having command of the ship (2). But may hypothecate to pay salvage.

The necessity for this power in parties intrusted with the navigation and safety of ships, is too obvious to require comment. Occasions would otherwise constantly occur, where the absence of such power would be productive of the deepest injury to the owners. Supplies might be refused, aid unadministered, and repairs neglected, to such an extent, as to cause the total abandonment or loss of the vessel, were the personal responsibility of the master the only available means of indemnifying the parties providing them. Bonds of hypothecation have been therefore favourably regarded by the Court of Admiralty. "They are given," observed Lord Stowell, "as a security for money advanced for the necessary use of a ship in a foreign port, where the owners and master have no personal credit, and where, without such assistance, the ship must continue to lie until it becomes rotten and useless. It is highly expedient that they should be upheld with a vigorous hand. The principle on which they are supported is of great antiquity, and deeply radicated in the general maritime law, from which it has been transferred into the law of this country. When the master cannot procure the necessary supplies, on the personal credit of himself or his employers, there can be no doubt that he is at liberty to pledge the ship itself, by way of security to the lender, and to stipulate for the payment of interest, after a rate Necessity for power of hypothecation.

(1) Abbott on Shipping, 127.

(2) *Parmeter* v. *Todhunter*, 1 Camp. 541.

which, in cases of bonds granted under other circumstances, would be deemed usurious" (1).

No original power of detention vested by hypothecation.

This species of pledge or lien delegated to other parties, and termed hypothecation, must not however be considered as vesting any original power of detention in the master himself. He may afford to others, as already observed, full security on the ship for liabilities, *bonâ fide* and necessarily incurred, on behalf of the owners, whether for repairs, for necessaries, or even for salvage; but he can claim no lien, in his own personal right, for any amount due to himself in respect of such expenses.

No usage authorizes actual lien on ship, for wages, repairs, &c.

Hence, it has been decided that no usage or custom vests in ship captains a power to detain their vessels for wages, or for stores, or repairs, purchased or effected in England (2).

Nor for debts, &c. incurred on voyage.

Nor, have they any actual lien for money expended, or debts incurred by them for repairs while on their voyage. If, observed Lord Ellenborough, C. J. (3), the necessary repairs be done abroad, the master may hypothecate the ship for them; and it is his own fault, if he subject himself to any personal liability, which he may renounce. It is said, however, that because he may hypothecate, he may acquire a lien by taking upon himself the payment of the repairs; for the persons to whom he hypothecates, acquire an inchoate lien on the ship, inasmuch as they are entitled by suit in the Admiralty

(1) *In re "The Hero,"* 2 Dods. 130.

(2) *Wilkins* v. *Carmichael*, Doug. 97; *Richardson* v. *Campbell*, 5 B. & Ald. 203 (*note*). From the marginal note of *White* v. *Baring*, 4 Esp. Rep. 22, it would appear that if, by reason of their contracts, ship-captains incur personal responsibility for the articles furnished for the ship, they thereby acquire a lien on the goods, as well as on the freight, co-extensive with their liability to the ship's creditors, but the cause was settled after a rule for a new trial had been moved, and the determination of the court was not had upon the point; and this case has been since overruled by that of *Smith* v. *Plummer*, 1 B. & Ald. 575.

(3) *Hussey* v. *Christie*, in Chan. 13 Ves. J., 594, and afterwards in K. B. 9 East, 426, overruling *Watkinson* v. *Barnadiston*, 2 P. Wms. 367.

Court to acquire possession of the ship itself. But it does not follow, because others, through the master, and though his hypothecation, may acquire a lien on the ship, that therefore he himself has such a lien. As to the cases in equity, they cannot be considered as professing to lay down any such rule as that the captain has a lien on the ship for repairs done abroad at his charge; the only difference between repairs done here, and those done abroad is, that there he may hypothecate, and here he cannot. Possessing therefore no lien on the ship, he has necessarily none upon the freight or cargo in like cases, as the lien on the freight and cargo is consequential to the lien upon the ship (1).

Nor on freight or cargo for like expenses.

The captain or master may, it is true, exercise, as agent and on the behalf of the owner, a right of lien upon the merchandize and cargo consigned by his ship, for the carriage in respect thereof; for the owner's rights are, as regards the carriage, co-extensive with that of a common carrier, and any part may be detained for the freight of all that is consigned to the same person—even though some part may have been previously removed into a lighter alongside a ship which has been sent by the consignee (2). Such right, however, extends to the charges for freight only, and not to those for wharfage (3). Nor does it exist except in those cases where the master of the vessel has a power to receive the freight. He has no prospective lien thereupon so as to insist upon payment to himself instead of the owner; although a payment to him, in the absence of any notice by the owner to the charterer to withhold it, would be a good and valid payment (4).

Lien lies on cargo for freight on behalf of owners.

The master has a lien on cargo for gen^l average. Seaife v Tobin. 3 B & Ad 328.

(1) *Smith* v. *Plummer*, 1 B. & Ald. 575.

(2) *Ward* v. *Felton*, 1 East, 506; *Soldergreen* v. *Flight*, cited *Hanson* v. *Meyer*, 6 East, 622.

(3) *Bishop* v. *Ware*, 3 Camp. 360.

(4) *Atkinson* v. *Cotesworth*, 3 B. & C. 649; 5 D. & R. 552, *S. C.*

The rights and powers of masters and owners of vessels, and the obligations attendant upon the shipment of goods, have, however, been sufficiently discussed in examining the privileges and responsibilities of carriers by water.

Hypothecation by the owners of ships.

The power of *owners* of vessels is of course unrestricted by the limited rules applicable to masters. They necessarily possess, inherent to their ownership, the right of pledging or mortgaging their vessels, and the mode usually resorted to for this purpose is, by what are

Bottomry or respondentia bonds.

termed *bottomry* or *respondentia* bonds, a species of security that originated in hypothecation, and under which money is borrowed for the purposes of the voyage; —the keel or *bottom* of the ship being pledged as security for the repayment. In case the ship be lost at sea, the lender loses also the whole of his money, but if she return in safety, he recovers both the principal lent, and such premium and interest, however usurious, as may have been agreed upon. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender. In such case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan be not upon the vessel, but upon the goods and merchandize, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who, therefore, in this case, is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; as when a man lends a merchant £1000, to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed; which kind of agreement is sometimes called

fœnus nauticum, and sometimes *usura maritima*. But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. 2, c. 37, that all monies lent on bottomry or at *respondentia*, on vessels bound to or from the East Indies, should be expressly lent only upon the ship or upon the merchandize; that the lender should have the benefit of salvage; and that if the borrower had not an interest in the ship, or in the effects on board, equal to the value of the sum borrowed, he should be responsible to the lender for so much of the principal as had not been laid out, with legal interest and all other charges, though the ship and merchandize were totally lost (1).

I have thus far stated the general nature of this kind of security, as defined by Mr. Justice Blackstone, inasmuch as it had its origin in, and in its nature is nearly allied to, that of hypothecation; but it is not my intention, nor is it necessary, to enter into a more full or particular elucidation of the subject.

Effect of bonds.

The nature and effect of such bonds, and the interest of the parties claiming under them, must always depend upon the particular form of the instruments themselves. No prescribed terms are essential to their validity. The matters usually and properly expressed are the circumstances which gave occasion to the loan—the sum lent—the rate of interest or premium agreed—the name and description of the ship—the voyage to be performed—the personal obligation of the borrower—the assignment of the vessel and freight—and the contingency on which the repayment depends. This last particular seems indeed, in the case of bottomry, altogether indispensable; because, unless it be expressly stated, or can be fairly gathered from the instrument, that the lender is to take the sea risks of the voyage, not only is the essence of bottomry wanting, but if the maritime interest be

No prescribed form.

(1) 2 Bla. Com. 457.

charged, the contract itself is usurious and void, not only as a charge upon the ship, but as a personal obligation on the borrower (1).

The terms therefore of the bond will regulate each particular case, and the extent and limit of the charge will be controlled by the expressions and spirit of the instrument alone. An instance of the construction of such bonds occurs in the following case :—

When respondentia bond gives no right to lien on cargo.

In a *respondentia* bond, the condition of which, after reciting that the money was lent upon *the goods laden and to be laden*, on board a certain ship, on her voyage out and home, was, that if the ship should proceed on her voyage, and return within thirty-six months (the dangers of the seas excepted); and, if the borrower, within thirty days after her arrival, should pay to the lender the sum agreed upon; or if, in the voyage, or within the thirty-six months, the ship should be lost by fire, enemies, or other casualties, the borrower should, within six months after such loss, pay to the lender a proportionable average on all the goods carried out and acquired during the voyage, which should be saved, then the obligation to be void; it was held, that this was no more than a personal obligation from the borrower to the lender, and did not give any specific pledge or lien on the home cargo or the proceeds thereof (2).

SHIP-OWNERS.

Owners of ships having possession, have a lien on cargo for freight, &c.

The owner of a ship (3) retaining the possession of it, has a lien on the cargo, for the hire of the ship, under a charter-party (4).

(1) Law Mag. vol. 14, p. 100; 2 Hag. Adm. Rep. 57.

(2) *Busk* v. *Fearon*, 4 East, 319.

(3) See also *ante*, p. 287, tit. "Common Carriers by Water."

(4) *Saville* v. *Campion*, 2 B. & Ald. 503; *Tate* v. *Meek*, 8 Taunt. 280; and see also *Trinity House* v. *Clark*, 4 M. & S. 288.

A vessel, freighted under a charter-party, is not necessarily transferred from the possession of the owner to that of the freighter. The broad principle formerly maintained that, in the case of a chartered ship, the charterer, during the existence of the charter-party, was, to all intents and purposes, the owner of the ship, and that therefore when goods were put on board by him in that character, the owner had no legal right to resume the possession of the ship, until the goods were unloaded, and had, consequently, no right to detain the goods, has been much narrowed and qualified by subsequent decisions (1). How far possession transferred by charter-party.

Thus, where by charter-party, it was covenanted that the owner should receive on board in London, all such goods as the freighter should think fit to load, and proceed therewith to Madras, and there, after delivering her outward cargo, receive from the freighter's agents a homeward cargo, and deliver the same in London; and that all the cabins but one, which was reserved for the use of the captain, should be at the disposal of the freighter, who was to appoint a supercargo, to superintend the stowage of the goods—the freight to be paid at so much per ton on the register-tonnage of the ship—and the captain and crew to be employed and paid by the owner; it was held, that there being no express words of demise of the ship itself in the charter-party, the freighter did not thereby become the owner for the voyage; but that the possession continued in the owner, and that he, therefore, had a lien upon the cargo for his freight (2). Words of demise of ship may operate as an actual transfer of possession.

And it makes no difference, in this respect, if the cargo be consigned to a third party. Thus, where a shipowner had agreed with another person by charter-party, No distinction when cargo consigned to a third party.

(1) See *Hutton* v. *Bragg*, 7 Taunt. 14; 2 Marsh, 339, *S. C.*, since overruled, see *Saville* v. *Campion*, 2 B. & Ald. 503; and *Christie* v. *Lewis*, 2 B. & B. 410; 5 Moore, 211, *S. C.*

(2) *Saville* v. *Campion*, 2 B. & Ald. 503.

to convey a cargo to Calcutta, and to deliver a return cargo at the East India Docks, in London, for certain freight on the ship's tonnage; the last payment thereof to be made by bills at four months, on the arrival of the ship in the Thames; and the latter accordingly, by his agents, put goods on board at Calcutta, and consigned them to Messrs. C. & Co., who were aware of the existence of the charter-party, and the ship-owner's captain signed a bill of lading, according to which, freight for the goods was expressed to have been paid by bills on London; it was held, that notwithstanding this bill of lading, the ship-owner had, as against Messrs. C. & Co., a lien on the goods for the hire of the ship, under the charter-party (1). In both these cases, possession was virtually in the owners of the ships, and hence they differ from those cases in which the charterer takes the vessel into his own service, and agrees to pay a certain freight for *the use and hire* of her. The principal question to be considered, therefore, in all these cases, is the effect of the charter-party in divesting or continuing the owner's possession of the ship; for, as in all other instances, there can exist no lien where there is not actual or constructive possession of the cargo.

Distinction between actual demise of ship, and a bare contract for stowage.

The proper distinction appears to be between an actual demise or letting to freight, and a bare contract or covenant for the stowage of goods; and the cases hitherto decided in favour of the ship-owner have proceeded on the assumption that the possession of the ship has continued in the owner himself(2).

Words of demise do not

Mere words denoting a demise of a ship do not ne-

(1) *Campion* v. *Colvin*, 3 Bing. N. C. 17; 2 Hodges, 116, *S. C.*

(2) *Tate* v. *Meek*, cited *Saville* v. *Campion*, 2 B. & Ald. 503; and *Boklinck* v. *Inglis*, 3 East, 380; and see *Lucas* v. *Nockells* (*in error*), 4 Bing. 729; 1 M. & P. 783; 2 You. & J. 304. An owner of a ship, notwithstanding he has let her out for twelve months, by charter-party *containing no terms of conveyance of possession*, has a sufficient possession of her to maintain trespass.

cessarily preclude a contrary conclusion, if a more limited intention can be inferred from the charter-party. Thus, where the owner of a ship had entered into a charter-party with a freighter, by which the former "*granted and to freight let*," and the latter "*hired and to freight took*" the ship, for a voyage out and home, and the owner covenanted that, the vessel being well manned and furnished, as is usual for vessels in the merchant service, the master should receive on board, at London, goods to be sent alongside her there by the freighter, and deliver them from alongside at Newfoundland to the agents of the freighter, according to bills of lading; and such cargo having been discharged there, he should receive other goods in like manner, and deliver them at Demerara, and, having discharged the same, should receive other goods there, and deliver them at London, agreeably to bills of lading. The owner also agreed that the ship's boats should assist in unloading and loading the cargoes, when required by the freighter, provided no impediment was thereby to be made in carrying on the exclusive duties of the ship; in consideration whereof, the freighter covenanted to send and take the goods from alongside, and to pay for the freight and hire of the vessel for the voyage £2600, with primage, &c., one quarter part thereof on delivery of the cargo at Newfoundland, by good bills at 60 days' sight on London, and the remainder, by good bills, at two months' date, from the day of the ship's report inwards at the port of London. The voyage was performed, and goods of third persons brought from Demerara, under bills of lading deliverable to the consignees, on payment of certain specified freight therein mentioned, which freight the owner received. Bills of exchange, for one quarter's freight, were drawn on the freighter at Newfoundland, which were afterwards accepted and dishonoured by him, and no sum or bill for the remaining three quarters' freight, per

necessarily preclude a more limited construction.

charter-party, was given or tendered to him, on the return of the ship. It was held, that taking the whole of the charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner, notwithstanding the words of grant used in its commencement; and that the mere circumstance of his having entered into an agreement with the charterer as to the mode by which he should be paid for freight, did not divest him of his lien on the cargo; and it made no difference that he had delivered the homeward cargo to the consignees, and received the freight due upon the bills of lading, which was different from that due upon the charter-party (1). On the other hand, though the charter-party contain no words of actual demise, there may be stipulations in it, equivalent, in their effect, to an actual parting with the ship, *pro hâc vice*. Thus, it has been held, that where the owners of a ship, by deed, appointed one Betham to the command of their ship, on a voyage from London to Calcutta and back; the latter loading her out and home, and guaranteeing to the owners a certain amount of freight, to be paid monthly, and secured by the freight bills, which were to be made payable to certain trustees for the owners and Betham, and transmitted to England, but retaining the surplus, or making good the deficiency; and the owners placing an agent on board to superintend the management of the stores, with power to displace Betham and appoint another commander, in case of his breaking the agreement on his part; it yet amounted as an appointment of the freighter to the legal ownership of the ship, *pro tempore*, and he alone was entitled to receive the freight for the carriage of the goods (2).

And though the charter-party contain no words of demise, it may, in effect be equivalent in its terms.

(1) *Christie* v. *Lewis*, 2 B. & B. 410; 5 Moore, 211, *S. C.*; overruling *Hutton* v. *Bragg*, 7 Taunt. 14.

(2) *Newberry* v. *Colvin* (*in error*), 1 Cr. & J. 192; 7 Bing. 190, overruling *S. C. nom. Colvin* v. *Newberry*, 8 B. & C. 163; 2 M. & R. 47.

The grounds on which it was attempted to establish the possession of the owners were, first, that the freighter was appointed to the command of the ship by them; secondly, that an agent was put on board, by the owners, with powers inconsistent with Betham's ownership; and, thirdly, that the owners virtually received the benefit of the homeward freight, by the transmission of the freight bills to England.

Appointment of captain and crew by owner no retention of possession.

In delivering judgment, Tindal, C. J., observes, "with respect to the first objection, it is almost the invariable practice and usage, that the owners of a ship, although they let it out upon freight to a charterer, do themselves appoint the captain and the crew; the chartering of the ship not being so much the chartering of the hull, as of the ship in a state fit for the purposes of mercantile adventure.

Nor the appointment of a party to superintend the acts of the captain in such character only.

"The second objection is answered by the fact, that the authority of the agent was limited to the superintendence of the acts of Betham, as captain, and not as freighter; the utmost authority given to the agent being that of displacing the master and appointing another, in case Betham should be guilty of a breach of any of the covenants or agreements on his part. But if Betham ceased to be master, he continued, nevertheless, by the terms of the charter-party, to be the freighter of the ship, possessing the same power to take goods on board, and liable to the same responsibilities, on the one hand, to the owners, for the time-freight for which he had contracted; on the other hand, to the shippers of goods, for the safe conveyance of the goods shipped.

Nor does the receipt of freight bills, as security for freight, constitute a possession in the owners.

"As to the third objection, the charter-party gave the owners a security on freight bills received by the freighter, but gave them no direct or immediate interest in the freight earned, the whole of the surplus of which belonged to Betham. If Betham had obtained no homeward cargo from Calcutta, so that no freight bills could

have been transmitted, the owners would still have been entitled to their time-freight. The freight earned by Betham on the intermediate voyage, was not a security to the owners; and even, in the homeward voyage, if the ship had been lost, there might have been no freight payable to the freighter, but still he must have made good his own liability to a monthly freight, for the use and hire of the vessel."

I have given this portion of the judgment at some length, as explaining the mode in which the ownership may, in the generality of cases, be tested. Any words in the charter-party, plainly showing that the one party is to give up to the other, and the other is to take and hold possession for a limited period, will necessarily divest the owner of possession of the ship, and consequently of any right of lien on the cargo with which she is freighted.

Power of lien may be reserved by terms of the charter-party, though possession be parted with.

But, though the owner can claim at law no right of lien upon the cargo without actual possession of the ship, he may reserve to himself that power by a full and unequivocal declaration of intention in the charter-party, that he shall retain the right of lien upon the lading of the vessel. This express contract renders it unnecessary to inquire in what relation the parties have placed themselves by the other provisions of the charter-party. It amounts, in fact, to a covenant on the part of the charterer that, whatever may be the legal operation of the charter-party, as between themselves, the charterer's possession of the ship shall be the possession of the owner, so far as the right of the latter on the cargo is in any way concerned (1). And if such lien be expressly reserved by a charter-party, it attaches on the goods, though assigned by the charterer, previous to their conveyance. Thus, where it appeared that the owner of a ship had made such reservation, and the charterer had

Reservation of lien by a charter-party not defeated by assignment of the goods by the charterer.

(1) *Small* v. *Moates*, 9 Bing. 579; 2 M. & Scott, 674, per Tindal, C. J.

purchased the goods and put them on board, and subsequently transferred them, with a stipulation that they should be conveyed to their destination, it was held, that even against an endorsee of the lading, they were subject, not only to that particular freight, but to the ship-owner's lien for a balance due to him under the charter-party, *whether possession of the ship was, by the charter-party, completely out of the ship-owner, and vested in the charterer or not* (1).

No lien exists for unliquidated damages.

But no lien exists by the usage of trade in respect of unliquidated damages. For instance, where the freighter of a ship covenanted that if she should not be fully laden, he would not only pay for the goods on board, but for so much also, in addition, as the ship would have carried, for which he had before stipulated to pay freight according to different rates for three descriptions of goods; it was held, that the ship-owner had no lien upon the goods actually on board for the amount of dead weight; in other words, for the compensation in damages, which he was entitled to for the freighter's breach of contract in not putting a full loading on board, which damages were unliquidated (2).

Nor for breach of covenants.

Nor will a mutual obligation in a penal sum on the parties, the ship, the tackle, or the merchandize consigned, alter the rights of the owner in this respect, so as to entitle him to a right of lien on breach of the covenants contained therein. The lien at common law exists only in respect of the freight actually earned by the arrival of the goods at the stipulated place of destination. Covenants, therefore, for demurrage, or for providing a full cargo, cannot be enforced by the specific remedy of lien, though the charter-party contain such penal clause. The remedy for such matters rests entirely in covenant, and the mere penal clause will not

(1) *Small* v. *Moates*, 9 Bing. 579; 2 M. & Scott, 674, *S. C.*

(2) *Phillips* v. *Rodie*, 15 East, 547.

extend the right of lien. If it be the intention to create such right, it must be by express provision, that the ship-owners shall have a right to detain the goods which shall be brought home, until all their demands under the covenants are satisfied, inasmuch as a lien may be extended, or wholly excluded by particular contract (1).

Nor for freight of goods put on board, but relanded under process of law.

Nor can lien be maintained for a sum of money claimed to be due in respect of goods which are put on board in the loading port, but afterwards relanded, and restored to the agent of the freighter, under process of law, at the loading port, not being freight *actually earned* within the terms of the charter-party (2).

Nor for port-charges unless by stipulation.

So, a special provision in the charter-party that the charterer shall pay the port charges, will not entitle the owner to any lien in respect of the payment of them, for they are not in the nature of freight (3), unless it be specially stipulated in the charter-party that the owner shall exercise such right if the charges be not paid on delivery of the goods. His remedy, in the absence of such stipulation, is by action against the charterer for a breach of covenant by non-payment.

A contract for lien, under a charter-party, it has been shown, cannot be defeated by a sale of the cargo to other parties, so as to deprive the owner of his lien; so, sub-freighters are subject to the lien of the ship-owner, under the contract of the original freighter, to the extent of their freight, though the ship be freighted by the latter

Sub-freighters subject to lien to the amount of their freight.

(1) *Birley* v. *Gladstone*, 3 M. & S. 205. Lord Ellenborough, C. J., in delivering judgment, observed, that whatever benefit was to be derived out of such a covenant, must be through the medium of a court of equity, and a bill was subsequently filed in Chancery to obtain a declaration that the ship-owners were entitled to a lien in equity, but the bill was dismissed by Sir W. Grant, M. R. See 2 Mer. 401.

(2) *Birley* v. *Gladstone*, *supra*.

(3) *Faith* v. *East India Company*, 4 B. & Ald. 630.

as a general ship (1). And even if the charterer be indebted to his agents abroad, who purchase goods for him, and consign them, on their homeward voyage, to other agents, to whom he is also indebted, the goods will still be considered, under the original contract, the goods of the charterer, and remain liable to the full lien of the owner, under the charter-party (2).

It was argued, in *Faith* v. *East India Company* (3), that if the sub-freighters had paid the freight in advance, they would not have been bound to have paid it over again; and that therefore the owner could not, in that case, have insisted on his lien: but this point seems as yet unsettled. In the judgment, Abbott, C. J., observes, "It is not necessary to decide what effect the payment of the freight, if paid before the goods were laden on board in the East Indies, would have had. If such an event had happened, which, however, is not very probable, perhaps the owner's lien for freight might have been thereby defeated."

Lien attaches whether payment of freight is to precede or be concomitant with delivery of cargo;

The right of lien attaches, whether, under the terms of the charter-party, the payment of freight is to precede the delivery of the cargo, or the payment and delivery are to be concomitant acts. Thus, covenants by the owner to deliver the cargo in good order and condition, and by the freighter to pay freight *on safe delivery*, partly in cash, and partly in approved bills of exchange, at four months' date, have been held to imply concomitant performance, and to entitle the owner to a lien on the cargo, till he was satisfied for the amount of freight remaining due (4). So, where the owner covenanted to deliver the cargo agreeably to bills of lading, and the freighters

And till bills of exchange have been given, if

(1) *Faith* v. *East India Company*, 4 B. & Ald. 630; *Mitchell* v. *Scaife*, 4 Camp. 298; *Paul* v. *Birch*, 2 Atk. 261.

(2) *Faith* v. *East India Company*, 4 B. & Ald. 630.

(3) 4 B. & Ald. 630.

(4) *Yates* v. *Railton*, 8 Taunt. 293; 2 Moore, 294, *S. C.*

such be the mode of payment agreed upon.

covenanted to pay one-third of the freight in cash *on arrival*, and the remainder *on delivery of the cargo*, by good bills of exchange, at four months' date; and the captain landed the goods in his own name, and offered them to the freighter at one delivery, on receiving the stipulated freight; it was held, that the owner had a lien on them until such bills of exchange were produced by the freighter (1).

Again, where a freighter consigned goods to certain parties in London, under an arrangement with the owner, that he would pay certain tonnage, partly in cash, when the ship should be reported inward at the Custom-house, and the remainder by good bills, payable at two months after date, from the day on which the delivery should be completed; and, at the same time, shipped other goods, in his own name, and which, by the bill of lading, were to be delivered on his paying freight for the same, as per charter-party. The vessel having arrived in London, the owner delivered the goods to the different consignees, on their paying freight reserved by bills of lading, at a less rate than that stipulated by the charter-party, but refused to deliver the freighter's cargo without payment of the freight due under the charter-party; and it was held, that he was entitled to detain it for the hire of the vessel, as the delivery of the goods and the payment of the freight were concomitant acts; and that if the master unshipped the whole of the cargo, the delivery would be complete, and the freighter should then pay and deliver bills for the amount of the freight, as stipulated by the charter-party (2).

No lien, if freight payable at a distant day.

But where the freight is made payable by bill of lading, according to the terms of a charter-party, which stipulates for the payment at a certain period after the

(1) *Yates* v. *Mennell*, 2 Moore, 297.
(2) *Tate* v. *Meek*, 2 Moore, 278.

delivery, according to the general principle in like cases, the owner has no lien on the freight (1).

If bills be taken and negotiated, it is a relinquishment of lien;

So, if payment is to be made by the delivery of good and approved bills, and the owner receive a bill to which he objects, but afterwards negotiates it, the negotiation amounts to an approval of the bill, and a relinquishment of his lien on the goods (2).

But lien may revive on dishonour of bills.

But where the party's own acceptances have been taken generally, or even bills of third parties, under circumstances not amounting to an adoption of them in payment, and are dishonoured before possession of the goods, or of some part of them, has been relinquished, the lien revives either upon the whole, or such as remain undelivered, as the case may happen (3).

SHIP-CARPENTERS, OR SHIPWRIGHTS.

Ship-carpenters have specific lien on ship.

The right of a ship-carpenter or shipwright to a specific lien on a ship for repairs, is now clearly settled, although formerly the *dicta* upon the subject may have been loose and inconsistent. The law inclines against general liens, but considers particular liens as founded in justice and favourable to trade. Accordingly, they have not been confined to those cases alone in which an obligation is created by law to do the act from which the debt to be secured arises, as in the case of carriers and innkeepers, but they have been established in various other trades, in which they have been questioned; and in most if not in all the cases in which the existence of a general lien in any particular trade has been debated, the

(1) *Lucas* v. *Nockells* (*in error*), 4 Bing. 729; 1 M. & P. 783; 2 You. & J. 304.

(2) *Hornecastle* v. *Farran*, 3 B. & Ald. 497.

(3) *Marsh* v. *Pedder*, 257; 4 Camp. 257; *Smith* v. *Ferrand*, 7 B. & C. 19; 9 D. & R. 803, *S. C.*; *Robinson* v. *Read*, 9 B. & C. 449; *Strong* v. *Hart*, 6 B. & C. 160; 9 D. & R. 189, *S. C.*

existence of a particular lien has been admitted (1). Upon this principle shipwrights have been held to have a lien upon ships for repairs, if actual possession be retained and the money for the repairs be due (2). The decision of Lord Hardwicke, when the point was brought under the notice of the court, though he there decided against the existence of the lien (3), is perfectly consistent with such acknowledged right, for the party claiming the lien had given up possession; and his Lordship appears to have assumed that there would have been such lien if the ship had remained in possession of the shipwright.

Debt must be due before lien can be claimed.

But it may be observed that, since to support a claim for lien, the debt for which the goods are detained must be due at the time when the lien is exercised, it is clear that a lien is wholly inconsistent where credit is given, or where there is an usage in the trade equivalent to a special agreement to give credit; for there can be no lien without an immediate right of action for the debt, and that does not accrue till the period of credit has expired. A shipwright therefore on the river Thames has been held to have no lien on a ship taken into his dock to be repaired, without an express agreement for that purpose, because, by the usage of the trade, the credit is always given to the owner (4); it being distinctly proved, in that case, that unless an express stipulation was entered into by the parties for a ready money payment, credit was always given; the period of such credit varying according to the different trades in which ships were employed. "This being the invariable usage," Lord Ellenborough observed, "I must consider it as the basis of the contract

Usage to give credit is equivalent to express contract.

(1) *Ex parte Deeze*, 1 Atk. 228.

(2) *Franklin* v. *Hosier*, 4 B. & Ald. 341; *ex parte Bland*, 2 Rose, 91.

(3) *Ex parte Shank*, 1 Atk. 234; and see per Lord Mansfield, in *Wilkins* v. *Carmichael*, Dougl. 97.

(4) *Raitt* v. *Mitchell*, 4 Camp. 146.

between these parties; and their respective rights and liabilities are precisely the same as if, without any usage, they had entered into a special agreement to the like effect." His Lordship also added, "I do not say that a shipwright has not a lien on a ship in his dock, where he is to be paid in ready money as soon as the repairs are finished; on the contrary, I am inclined to think that he has a lien like other artificers:" and this point, though not then the question immediately before the court, has since, as we have seen, been decided accordingly.

Agreement to put ship in *thorough repair* does not prevent claim for the work partly done.

But an engagement by a shipwright to put a ship into *thorough repair*, does not necessarily infer that he shall complete the work before he can require payment of any sum. Thus, where a ship outward bound with goods, being damaged at sea, put into a harbour to receive certain repairs which had become requisite for the continuance of her voyage, and a shipwright was engaged, and undertook to put her into thorough repair, but, before this was completed, required payment for the work already done, without which he refused to proceed, and the vessel, consequently, remained in an unfit state for sailing, it was held, that the shipwright might, notwithstanding, maintain an action for the work already done, though the repairs were incomplete, and the vessel was actually thereby prevented from continuing her voyage, at the time when the action was brought (1).

Parting with possession defeats lien.

A shipwright who has once parted with possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not by the law of England preferred to other creditors, nor have they any particular claim or lien upon the ship itself for the recovery of their demands (2).

(1) *Roberts* v. *Havelock*, 3 B. & Ad. 404.

(2) *Ex parte Hill*, 1 Mad. 61; *Hoare* v. *Clement*, 2 Show. 338; *Justin* v. *Ballam*, 1 Salk. 34.

Not so, merely giving up certificate of ship's register.

But a ship-builder who gave to a person, with whom he had contracted to build a ship, shortly before the actual completion of her, the builder's certificate, required by the register act, in order that his customer might obtain a certificate of registry in his own name (and which certificate was duly obtained), was held thereby not to have lost his right to retain the possession, until the residue of the stipulated price was paid, though he had thereby vested the *general property* of the ship in his customer (1).

SEAMEN, MARINERS, &c.

Seamen, &c. entitled to remedy *in rem*, against ship.

Persons having earned wages in the navigation of a ship, are allowed a lien, or specific remedy *in rem*, for their remuneration. The presumption is, that seamen who contract with the master, contract with him on the credit of the ship; whereas the master, who contracts with the owners, is presumed to trust to their personal credit (2). The case of the captain has been distinguished in this respect, from that of all other persons belonging to the ship, and the rule of law has its foundation in policy, and the benefit of navigation, for, as the ships may be making profit and earning every day, it might be attended with great inconvenience, if, on the change of a captain for misbehaviour, or any other reason, he should be entitled to keep the ship till he is paid (3).

Payments by ship-agents, abroad recognized by the courts here, on ground of lien of seamen.

Payments by ship-agents, under the authority and order of a foreign court, comprising the wages of seamen, have been consequently recognized by the courts here, on the ground of such acknowledged right of lien; while on the other hand, the right of the ship-captain in respect

(1) *Woods* v. *Russell*, 5 B. & Ald. 942.

(2) Abbott on Shipping, 476.

(3) *Wilkins* v. *Carmichael*, Doug. 101, per Lord Mansfield, C. J.; *Clay* v. *Snelgrave*, 1 Lord Raym. 577.

of lien has been expressly negatived. Thus, where a ship, on her arrival at Leghorn, was attached to answer the claim of certain merchants in London, for compensation on account of her not having carried a quantity of tobacco to Rotterdam, agreeably to bills of lading; and the ship-agents having been obliged to give security to answer the claim, and afterwards, under the sentence of the court, to pay the amount,—paid also a certain sum for the salvage of the ship, she having been driven on shore in a gale of wind, before she was taken possession of by them, and also other sums, in pursuance of an order of the court, for the wages of the captain and the crew, for butcher's and ship-chandler's accounts, and sundry ship disbursements; the court here was clearly of opinion that the money paid under the attachment, the salvage, and the mariners' wages, was a lien on the ship, but that the captain's wages, and other disbursements were not so, and that the owners of the ship were therefore entitled to deduct the former sums from the proceeds of the sale (1).

Ship or proceeds may be attached by Court of Admiralty.

Lastly, the proceeds of any sale of a ship, while remaining in court, or the ship itself, may be attached by process out of the Court of Admiralty in order to enforce recovery of seamen's wages (2).

(1) *Richardson* v. *Campbell*, 5 B. & Ald. 203 (*note*).
(2) Abbott on Shipping, 474.

CHAPTER XIX.

BANKERS.

Bankers' lien is for their general balance upon all securities.

THE lien of bankers attaches generally upon all bills and other securities of their customers in hand (1), unless there be circumstances to show that they have received them under special arrangement, excluding the application of the common rule. As, for instance, where bankers, being in advance to their employer, to the amount of £1500, receive from him securities as a pledge for £1000 only, no lien exists upon such securities for any further sum than the particular amount specified (2). "It is very proper," observed Lord Kenyon, "that there should be a known rule to govern the conduct of all persons of this description, whose dealings are very extensive; and that rule is, that no person can take any paper securities out of the hands of his banker without paying him his general balance; unless such securities be delivered under a particular agreement which enables him to do so" (3).

Except when received for a special purpose.

General rule.

Bills paid generally, and applied to par-

Where a customer lodges bills of exchange in the hands of his bankers generally, and on an advance of

(1) *Davis* v. *Bowsher*, 5 Term Rep. 488; *Scott* v. *Franklin*, 15 East, 428; *Jourdaine* v. *Lefevre*, 1 Esp. Rep. 66; *Bolton* v. *Puller*, 1 Bos. & Pul. 546; *Giles* v. *Perkins*, 9 East, 13. In the latter case, Lord Ellenborough, C. J., observes, "that the only difference between the practice stated of London and country bankers in this respect is, that the former, if overdrawn, have a lien on bills deposited with them, though not endorsed; whereas, country bankers, who always take the bills endorsed, have not only a lien upon them if their account is overdrawn, but have also their legal remedy upon the bills by the endorsement."

(2) *Vanderzee* v. *Willis*, 3 Bro. C. C. 21.

(3) *Davis* v. *Bowsher*, 5 Term Rep. 488.

money to him by the latter, he applies it to the discount of such of the bills as happen to be nearest in value to the sum advanced, without any special agreement to that effect, it is no invalidation of the bankers' general lien upon all other bills in their hands, but they may retain them in order to secure the payment of their general balance (1).

ticular account will not invalidate lien.

The agent of bankers at a branch bank has a lien on the funds in hand to the amount due to him from his principals. But, where London bankers, having a branch bank at Edinburgh, stopped payment on the 2nd of January, and wrote to their agent there, apprising him of the fact, and directing the business of the bank to be discontinued; and, on the 4th of January, before the notice reached the agent, a party paid into the bank a sum of money, in notes and cash, to be remitted to the house in London; but after the news reached Edinburgh, and whilst the notes were still in the agent's possession, gave him notice not to part with them, and they consequently remained in the agent's hands till the 26th of January, when a fiat issued against the bankers in London; it was held, that the assignees were obliged to refund the sum to the party who remitted it, although the agent had been permitted to retain it in his hands in part satisfaction of his general lien (2).

Lien of an agent of bankers at a branch bank.

A lien may also exist under agreement, in favour of the general body of proprietors of a bank, upon the stock or shares of individual shareholders; but this right is generally reserved by the express terms of the deed of settlement, under which the company or partnership is established.

Of joint-stock banking company against shareholders.

Nor will the bankruptcy of the shareholder prevent the operation of the lien upon his shares where, under such arrangement, the certificates of his ownership are

Lien on shares of partner in joint-stock bank, acquired

(1) *Davis* v. *Bowsher*, 5 Term Rep. 488.

(2) *Ex parte Cunningham, re Maberly*, 3 Deac. & Chit. 58.

under deed of settlement, not affected by possession of shareholder on bankruptcy.

permitted to remain in his possession. By a clause in the deed of settlement of a banking company, it was stipulated, that the company should have a lien on the shares of such proprietors as were customers and indebted to the bank, and that no share should be transferred without the consent of the directors; and an abstract of these provisions was endorsed on the certificate of the share held by each proprietor. A bankrupt, at the time of his bankruptcy, was the owner of thirty of these shares, and had in his possession the certificates of ownership thus endorsed, being then largely indebted to the bank for advances; it was held that these shares did not pass to the assignee under the clause of reputed ownership in the bankrupt act, so as to defeat the lien of the bank, which had been provided for in the deed, for the certificates themselves bore upon their face evidence of the conditions under which they were held, and could not have been disposed of by the bankrupt, without conveying the knowledge of such fact to the party to whom he might have assigned them (1).

Right of action by bankers in respect of negotiable securities, held as lien.

Besides the bare right of lien in favour of bankers who have discounted bills for a customer, or accepted them for his accommodation, they possess moreover, until payment, a right of action on all negotiable securities belonging to their customers, which may come subsequently to their hands (2). Nor will an offer by the customer, to discharge the balance, unaccompanied by an actual tender, defeat such action. Thus, where the assignees of a banker, after his bankruptcy, sued the drawer of one of the retained securities, made payable to the bearer, who defended the action, on behalf of the customer, it was held, that they might recover against such drawer the amount of the balance, notwithstanding an offer made to the assignees, on behalf of the cus-

Bare offer by customer to discharge balance, will not defeat action brought by banker on the securities.

(1) *Ex parte Plant*, 4 Deac. & Chit. 160.
(2) *Bolland* v. *Bygrave*, R. & M. 271.

tomer, before the action brought, that, though he was not aware of the exact balance, if any were due, he was ready to pay it, on receiving back the security; for this was no tender of the balance to defeat the action (1).

May recover against acceptor of such bills, though the party who deposited have received satisfaction from drawer.

And in an action brought by bankers, as the holders of collateral securities for value, it was held by Lord Ellenborough, that they might recover against the acceptor of an accommodation bill, although the party who deposited the bill, had it in his hands when it became due, and had received satisfaction from the drawer (2).

Right to retain not affected by customer having balance in his favour, unequal to any one of securities retained.

Neither is the right of bankers to retain the negotiable securities of a customer affected by the fact that, in the subsisting state of accounts between the parties, there may be a balance due to the customer of a sum not equal to the amount of any one of the securities retained, and the court, under such circumstances, has refused to appropriate such surplus to any one of the bills, in reduction of the claim of the bankers suing any of the parties to the bill (3), for bankers who stand in this relation to a customer, having such lien upon any securities of that customer which may, in the ordinary course of business, be placed in their hands, have a right to retain them to countervail the liabilities they have so incurred on his behalf, till those liabilities have ceased (4).

Possession of bills, &c. must have been rightfully obtained.

The general principle is however applicable, that the possession of the securities thus retained must have been acquired by right, for bankers have no lien on muniments, papers, or securities casually left in their bank, after refusal to advance money on them as a security (5).

No lien vests

Nor can they retain the bills of a principal under a

(1) *Scott* v. *Franklin*, 15 East, 428.
(2) *Bosanquet* v. *Dudman*, 1 Stark. Rep. 1.
(3) *Bolland* v. *Bygrave*, R. & M. 271.
(4) *Ibid.* per Abbot, C. J.
(5) *Lucas* v. *Dorrein*, 7 Taunt. 278; 1 Moore, 29, *S. C.*

on bills of principal *pledged* by agent, if bankers have knowledge of such fact.

pledge made by an agent, if at the time they are aware, either by the endorsement or otherwise, that they are the property of the principal (1), for there exists a distinction in this respect between an actual deposit by way of security, and a delivery by way of discount.

Negotiable bills deposited available as lien.

The deposit of negotiable bills, where bankers are unaffected with any knowledge that they are the property of another, stands upon different ground, and the bills are available not only by the bankers themselves, but by third parties to whom they may be transferred as security for a debt due from the bankers (2); for whatever may be the terms upon which bills are remitted to bankers with an endorsement, they so far differ from goods in the hands of a factor, that the bankers may pledge or discount them, and the money received upon them having no earmark, cannot be recovered by the remitter after the bankers' bankruptcy, though against the faith of the agreement, but the remitters must come in as general creditors (3). But if bills have been remitted by a country bank to their bankers in London, and on the bankruptcy of the latter, remain in their hands undue or unapplied according to the authority given; or if they come subsequently into the hands of the assignees and the proceeds be received, they must be restored or paid over to the remitters, on the acceptances on their account being taken up, but subject to the bankers' lien for their balance; for by the contract, they remain the property of the remitters in the hands of the bankers, as agents for a particular purpose, viz., to hold until due, and to receive the proceeds.

And may be pledged or discounted by bankers.

But, if undue or unapplied, must be restored to remitter, subject to lien.

On bankruptcy of bankers, lien descends to assignees.

On the bankruptcy of bankers, all securities obtained by them, and the right of lien thereupon, descend to their assignees, nor can they defeat their benefit to, and

(1) *Treuttel* v. *Barandon*, 8 Taunt. 100.
(2) *Collins* v. *Martin*, 1 Bos. & Pul. 648.
(3) *Ex parte Pease*, 19 Ves. J. 25; 1 Rose, 232, *S. C.*

remedy under them, by giving them up to the customer in contemplation of bankruptcy (1).

Subject to lien, bills &c. remain the property of customers.

Subject, however, to this lien, all bills and securities of the customer's, remaining in the bankers' hands unpaid or unsatisfied, are, and continue to be, the property of the customer, and on the bankruptcy of the bankers, the Court of Review, upon petition, will order their assignees to give them up, upon the customer's satisfying the lien, and giving a sufficient indemnity as to any acceptances the bankers may be under to him (2); and the circumstance of the bills being endorsed or not, makes no difference (3).

Court will order inspection of articles detained, if heir-looms.

And, meanwhile, during the detention by bankers, as a lien, of articles (being heir-looms), the court will, on motion, order inspection, if such inspection be essential to the furtherance of a bill of discovery which may have been filed; but the convenience of the bankers will, at the same time, be consulted by the court (4).

Acts inconsistent with claim may rebut presumption in favour of lien.

The claim of lien will not be allowed where long and continued acts, inconsistent with the right, afford a presumption that it never had existence. A debenture for a tontine annuity was deposited by a party (who afterwards died intestate) with his bankers, one of whom received the dividends and placed them to the credit of the intestate's account. The intestate died in 1801, and a commission of bankruptcy issued against the bankers in 1810, notwithstanding which, the same partner continued to receive the dividends, and pay them to the widow of the intestate, up to the period of his own death, which happened in 1822. Some time afterwards

(1) *Wilson* v. *Balfour*, 2 Camp. 579.

(2) *Ex parte Buchanan*, 1 Rose, 280; *ex parte Holford*, 2 Rose, 162; *ex parte Leeds Bank*, 1 Rose, 254; *ex parte Wakefield Bank*, 1 Rose, 243; *ex parte Sollers*, 1 Rose, 155; 18 Ves. J. 229, *S. C.*

(3) *Ex parte Twogood*, 19 Ves. J. 229; *Zink* v. *Walker*, 2 Wm. Bl. 1154.

(4) *Earl of Macclesfield* v. *Davies*, 3 Ves. & B. 16.

the assignees of the bankers claimed a lien on the debenture for a *debt due from the intestate* to the banking house; but it was held that after so long an abandonment of any claim of lien, the assignees could not then support it (1).

CHAPTER XX.

VENDORS AND PURCHASERS OF CHATTELS PERSONAL.

General right of vendors.

THE general rights and remedies of vendors of chattels personal are more commonly exercised under the doctrine of stoppage *in transitu*, than under that of lien, and are, therefore, treated of and defined with greater particularity in a subsequent portion of the book, than is deemed necessary in this place. It is obvious, however, that occasions must sometimes arise before the goods sold have been dispatched out of the vendor's possession, when the remedy available is peculiarly that of lien. Notwithstanding a previous sale, a special property in the articles sold continues in the vendor, until such time as the purchaser pays or tenders the price agreed upon (2). The contract meanwhile remains ambulatory, vesting in the purchaser a general property, but enabling the seller to secure his demand by retention of the articles sold.

Part payment no bar to right of lien.

Part payment, it has been decided, will not take the case out of the general rule. Such exception, as observed in an earlier page, would operate as a virtual abrogation of the rule itself, since every payment, however small, by way of earnest, would thus prevent its application (3).

(1) *Ex parte Douglas*, 3 Deac. & Chit. 310.

(2) *Mason* v. *Lickbarrow*, 2 Term Rep. 63; 1 H. Bl. 357; and 6 East, 21; and see 2 Bl. Com. 448; *Feise* v. *Wray*, 3 East, 93.

(3) *Hodgson* v. *Loy*, 7 Term Rep. 445, per Lord Kenyon, C. J.; *Hinde* v. *Whitehouse*, 7 East, 571; *Hawes* v. *Watson*, 2 B. & C. 542; 4 D. & R. 22, *S. C.*.

Nor part delivery of the articles sold.

Nor is the delivery of a portion of the goods sold sufficient to divest the lien of a vendor on the remainder undelivered, unless such delivery be made in the progress of, and with a view to the delivery of the whole, on the ground that neither before, nor at the time of the delivery, there had been any intention to separate part of the cargo from the rest (1). For where an intention is manifest that part may be separated from the residue, possession of part only will not divest the vendor's lien on the remainder (2). And it is no waiver of a condition that the vendor shall be paid for goods on delivery, that he allows the purchaser to carry away part of them without payment. It amounts only to a dispensation, *pro tanto*, and the vendor continues, notwithstanding, entitled at any time to stand on his rights as they were originally established by the contract of sale (3).

No right accrues to sub-vendees where actual possession not obtained.

The right of detainer on the part of a vendor against the original vendee exists, in reason, with equal force against other vendees claiming under him. If, consequently, a vendee have not acquired actual possession, he cannot confer upon sub-vendees a better title than possessed by himself, viz. a right defeasible on non-payment (4). There must be something done by the original vendee in the interval between the first sale, and the claim of lien, to divest the vendor of actual possession, or the power to resume it continues, and delivery of the goods may be prevented.

Where customary mode of sale is by hand-

The delivery to a vendee of an invoice of goods lying in a warehouse has been held not to constitute such a

(1) *Slubey* v. *Heyward*, 2 H. Bl. 504; *Hammonds* v. *Anderson*, 1 New Rep. 69.

(2) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; 1 Nev. & M. 229, *S. C.*; *Hanson* v. *Meyer*, 6 East, 614; 2 Smith, 670; *Simmonds* v. *Swift*, 5 B. & C. 857; 8 D. & R. 693, *S. C.*

(3) *Payne* v. *Shadbolt*, 1 Camp. 427.

(4) *Craven* v. *Ryder*, 6 Taunt. 433; 2 Marsh, 127, *S. C.*

ing to vendee a delivery order, delivery of an invoice of goods in a warehouse does not prevent vendor's lien, unless actual possession taken.

transfer of the property as to entitle sub-vendees, on a second sale by a vendee, to the possession of them, where the customary mode of delivery is by the vendor handing to the vendee a delivery order. Thus, in the following case: one Dixon purchased from a person named Yates forty-six puncheons of rum lying in the warehouse of Yates at Liverpool, and sold them to one Collard, who was a clerk of Yates, but carried on business for himself. Dixon gave Collard an *invoice*, specifying the marks and numbers of each puncheon, and took his acceptances for the price, the rum and the samples meanwhile remaining in Yates' warehouse. The invariable mode of delivering goods sold while in warehouses at Liverpool was, it appeared, by the vendor's giving a *delivery order* to the vendee. Dixon was asked by Collard for delivery orders, but declined giving any, except for two or three puncheons, which Collard received. Collard then marked, coopered, and gauged the casks. While the bills were running, Collard sold twenty-six of the puncheons to Kaye, who paid him for them, and by Collard's permission, without the knowledge of Dixon, gauged and coopered the casks in the warehouse of Yates, and marked them with his initials; Collard gave *an invoice* to Kaye, stating the marks and numbers of the casks, and by whom the rum was bonded. Whilst the bills were running, Collard also sold eighteen puncheons of the rum to two other parties, to whom he gave similar invoices, and samples: and who afterwards obtained three of the puncheons, on a delivery order signed by themselves, but not by Dixon, and paid Collard for the whole. The acceptances given by Collard for the price of the puncheons, were dishonoured. It was held, upon a special case (whereby it was agreed that the court should be at liberty to draw from the facts any inference that the jury might have drawn), that Collard never had acquired the actual possession of the

rum, and on his dishonouring his acceptances, Dixon had a lien on it for the price: and that Collard's sub-vendees could not claim against Dixon the rum which remained undelivered to them (1).

The conduct of the vendee, in the case cited, did not necessarily infer an intention, on his part, to take actual possession. The marking was an equivocal act, and might merely have been for the purpose of identity; and the delivery of two puncheons was a distinct separation of that portion from the whole bulk, by the vendor, and not an inchoate delivery of the whole. If the customary delivery order had been actually given by the vendor to the vendee; and the latter, before his bankruptcy, had exercised a valid transfer, according to the custom of the place, there can be no doubt, that, as between the vendor and sub-vendees, the right of lien would then have been defeated.

If transfer made of actual delivery order, vendor's lien defeated, as against sub-vendees.

But a vendor, under like circumstances, will not lose his lien against the original vendee, by giving a delivery order, if the goods remain in the vendor's own warehouse, and are not taken into the actual possession of the vendee. The owners of a quantity of wine, having placed it in a warehouse which they rented, sold part of the stock to one Wright, and delivered to him an invoice containing the terms on which it was sold, and stating that it was to remain in their warehouse "rent free." Wright accepted a bill in payment for the wine, which was passed away by the vendors, who then gave Wright a delivery order. Wright went into the market and sold part of the wine he had purchased, and that part was delivered to the vendee. It was proved, as in the preceding case, that in Liverpool, the mode of delivering goods, in a warehouse, was by the transfer of a delivery order; that the party possess-

Delivery order for goods in vendor's warehouse does not defeat right of lien as between vendor and original vendee, unless actual possession taken.

(1) *Dixon* v. *Yates*, 5 B. & Ad. 313; 2 Nev. & P. 177, *S. C.*

ing this order might go into the market, and upon the authority of it sell the goods, as Wright had done in the present instance, and that the delivery orders were not transferred without the vendor first receiving payment for the goods; yet it was held that the vendors were entitled to retain the wine on the bankruptcy of Wright; the giving of the delivery order not operating, as between the original vendor and vendee, as a complete transfer of the goods (1). And though a charge be made by the vendor against the vendee, for warehouse rent, his lien is not thereby defeated, if the charge be in pursuance of the terms of the original contract of sale, for the rent is, as it were, only an additional price. The effect is, not to make the warehouse that of the vendee, but to make it a part of the contract between the parties that the goods are not to be delivered until not only the price, but the rent is paid. Nor is the case altered, though the rent be actually paid by the vendee, so long as the goods remain in the vendor's warehouse. But if they be in the hand of a third person, such third person, by a delivery order from the vendor, becomes the agent of the vendee, and the warehouse is the warehouse of the latter, as between him and the vendor (2).

Nor, even if rent be charged for warehouse room.

If a bill of exchange be taken from the vendee, who meanwhile sells, and obtains the delivery of part of the goods warehoused, such delivery is a delivery *pro tanto*, and not a delivery of the whole, and the vendor may detain the residue, on the subsequent bankruptcy of the vendee, and dishonour of the bill, till payment be actually made.

Nor, if bill of exchange be taken, and part of goods delivered, if vendee become bankrupt.

(1) *Townley* v. *Crump*, 5 Nev. & M. 606; 1 Har. & W. 564, *S. C.*

(2) *Miles* v. *Gorton*, 2 Cr. & M. 504; 4 Tyrwh. 295; and see *Bloxam* v. *Sanders*, 4 B. & C. 941; 7 D. & R. 396, *S.C.*; *Winks* v. *Hassall*, 9 B. & C. 372; and see *contrà*, *Hurry* v. *Mangles*, 1 Camp. 452; but, in that case, there was not only an actual payment of rent, but the rights of a third party intervened, and the rent was paid by him at a time when the right of lien was, at all events, suspended.

A delivery of the whole, it seems almost superfluous to observe, will entirely divest the vendor of his right, for he has no longer that possession which forms the basis of his claim. Nor is it essential that the goods shall have come to the "corporal touch" of the vendee, for a delivery to his agent is a delivery to himself. So the delivery of the key of the vendor's warehouse to the purchaser, for the purpose of giving him possession (1), amounts to a constructive delivery of the goods themselves. If, however, such delivery be conditional, and the condition be not performed, the vendor will be entitled to retain the whole, or whatever part of the goods remains in his possession, for the price of the whole (2). So if a preliminary act be necessary to be performed in order to vest the property, as, for instance, that of weighing, no complete present right of property attaches in the buyer, till the weighing has taken place; and though part of the goods may have been weighed and delivered to the vendee by his direction, the vendor may, notwithstanding such part delivery, upon the bankruptcy of the vendee, retain the residue which still remains unweighed in the warehouse, in the name and at the expense of the vendor (3).

Delivery of the whole divests right of lien.

Postponement of the day of payment, or, in other words, credit given to the purchaser, is another bar to the vendor's right of detainer; for till such credit expires, there is no debt due, for which the lien can be claimed. The buyer has, in such case, a right to immediate possession, and may enforce it by action of trover or detinue, leaving the vendor to his remedy by action when the time of payment arrives (4). But if the buyer suffer

Credit given, bars the right.

But revives if

(1) *Ellis* v. *Hunt* 3 Term. Rep. 464.

(2) *Ex parte Gwynne*, 12 Ves. J. 379.

(3) *Hanson* v. *Meyer*, 6 East, 614.

(4) *Hammonds* v. *Anderson*, 1 New Rep. 69; *Bunney* v. *Poyntz*, 4 B. & Ad. 568; 1 Nev. & M. 229, *S. C.*; Com. Dig. tit. Agreement, B. 3, 5 Ed. 4, f. 2; 17 Ed. 4, f. 1; *Houlditch* v. *Desanges*, 2 Stark. Rep. 337.

goods allowed to remain in vendor's possession.

the goods to remain until the period of payment has elapsed, and no payment in fact be made, then the seller has a right to retain them (1), for the purchaser having neglected to remove the goods pending the credit given, vests in the vendor, at its termination, the same power in every respect, which he might have originally exercised.

Lien determined by taking security for purchase money.

The powers of vendors of chattels personal, differ in one essential circumstance from those of vendors of realty. It has been shown, that the taking and negotiating of a note or bill on the sale of real property, does not amount to a relinquishment of lien on the land, for the amount of the unpaid purchase-money (2). On the sale of chattels it is otherwise; for the running securities, till dishonoured, or rendered nugatory by the insolvency of the purchaser, operate as a bar to the vendor's right of lien. The latter event would, however, be alone sufficient to revive the power, during the continuance of possession by the vendor, though no formal dishonour of the security had been communicated; for it would be idle to term that a security which the inability of the party giving it to meet his pecuniary engagements, has rendered a mere piece of waste paper. If the purchaser have actually become bankrupt, having, previously to his bankruptcy, accepted bills drawn on him for the amount of the goods, such acceptances are proveable under his commission, and lessen the lien of the vendor by the amount recovered, but do not defeat his remedy for the residue (3).

Unless security dishonoured, or purchaser become insolvent.

Where purchaser having given note becomes insol-

Under the particular circumstances of one case, where the agent of a vendor had taken payment for the articles purchased, by the promissory note of the purchaser, and

(1) *New* v. *Swain*, 1 Dan. & Lloyd's Merc. Ca. 193, per Bayley, J.

(2) Vide *ante*, p. 93.

(3) *Feise* v. *Wray*, 3 East, 93; *Edwards* v. *Brewer*, 2 Mee. & W. 375; *New* v. *Swain*, 1 Dan. & Lloyd's Merc. Ca. 193.

procured the amount of the note from parties, who continued to hold it till the purchaser's insolvency, and then took from the purchaser in discharge of the note a sub-sale of the property, it was held, that the vendor's lien was defeated, notwithstanding no removal of the property had been previously effected. This decision interferes, however, in no degree with the established position in favour of a continuing lien in general cases, inasmuch as the vendor had in this case not only negotiated the note, and received payment through his agent, but the parties themselves, claiming the property, had become the substituted purchasers, in consideration of the dishonoured note, and precluded themselves from recovering the amount from any prior holder. The following are the circumstances upon which this decision is founded:—

vent, and the party having discounted it for vendor's agent, holds it and becomes sub-purchaser, vendor cannot detain property sold by way of lien.

One Poyntz having given a general authority to a person named Davis to sell hay for him, the latter advertised a sale, by the conditions of which a deposit was to be made, and credit given on approved security for the remainder of the purchase money, and the lots were to be taken away within forty weeks of the sale. The hay was sold to a person named Smallbones, and a promissory note was given for the price. The purchaser then applied for leave to cut some of the hay, and it being granted, cut and took away part, but was afterwards forbidden by Davis to remove the residue. Davis endorsed the note and discounted it at his bankers', who credited him with the amount, *minus* the discount; and the note was afterwards dishonoured. Davis having become bankrupt, it was agreed between the bankers and Smallbones, that the latter should sell them the residue of the hay, and that they should pay him part in money, and return him his note in satisfaction of the residue. Subsequently to this, and within forty weeks after the sale, the bankers demanded the hay of Davis' principal, and he refused to deliver it on the ground that he had a lien for the purchase money; but

in an action of trover brought for the recovery of it, it was held that he had no lien, because he was to be considered as having been paid for the hay by reason of his agent having taken the vendee's promissory note, and discounted it, and it being outstanding in the hands of the party claiming the hay (1).

Vendor may recover goods by action of trover, if obtained by fraud.

It remains lastly to be observed, that a vendor, though divested by a fraudulent purchase of the possession necessary to found a right of lien, has yet another remedy, by resort to an action of trover; and it has been held, that if a vendee under terms to pay for goods on delivery, obtain possession of them by giving a cheque which is afterwards dishonoured, he gains no property in the goods, if, at the time of giving the cheque, he had *no reasonable ground* to expect that it would be paid (2). The question as to the right in such case, depends upon whether the contract of sale was so vitiated by fraud as to prevent the property in the goods passing to the vendee; and a preconceived design of obtaining them without payment is clearly such a fraud as to render the purchase invalid (3).

(1) *Bunney* v. *Poyntz*, 4 B. & Ad. 568; 1 Nev. & M. 229, *S. C.*; and see *Camidge* v. *Allenby*, 6 B. & C. 373; 9 D. & R. 391, *S. C.*

(2) *Hawse* v. *Crowe*, R. & M. 414; *Abbotts* v. *Barry*, 2 B. & B. 369; *Noble* v. *Adams*, 7 Taunt. 59; *Stevenson* v. *Hart*, 4 Bing. 476.

(3) *Earl of Bristol* v. *Wilsmore*, 1 B. & C. 514; 2 D. & R. 755, *S. C.*

CHAPTER XXI.

ACCOUNTANTS.—AGISTERS.—AUCTIONEERS.—COACHMAKERS.—DYERS, CALICO PRINTERS, AND BLEACHERS.—FARRIERS AND VETERINARY SURGEONS.—FULLERS.—INNKEEPERS.—LANDLORDS AND TENANTS.—LETTER-PRESS PRINTERS, PUBLISHERS, AND ENGRAVERS.—LIVERY-STABLE KEEPERS.—MILLERS.—MORTGAGORS AND MORTGAGEES.—PACKERS.—TAILORS.—TITHE-OWNERS.—TRUSTEES.—WHARFINGERS.

THE various trades and instances, yet remaining for inquiry, in which a right of lien has either been repudiated or established under the express sanction of judicial authority, have been so minutely governed by the general principles already defined as applicable to other cases, that little more than a summary of the decisions appears to be now requisite. With this view an alphabetical arrangement of the concluding subjects, in one general chapter, has been adopted as seeming to afford the most convenient and easy means of reference.

ACCOUNTANTS.

Accountants have no lien on bankrupt's certificate.

Accountants employed in bankruptcy have no lien on the bankrupt's certificate for the payment of their costs, unless under some special agreement (1). The costs, in such case, can only be recovered by action in the ordinary way.

(1) *Anon.* 1 Russ. & Myl. 330.

Agisters have no lien unless by special agreement.

Persons receiving horses, kine, or other cattle to pasturage, have no lien for the amount of their keep, unless by special agreement (1). This point has been satisfactorily settled by a recent decision in the Court of Exchequer (2), and the principle upon which the establishment of a specific lien depends, in general cases, has been fully and clearly explained. "I think," said Mr. Baron Parke in his judgment, "that, by the general law, no lien exists in the case of agistment. The general rule, as laid down by Best, C. J., in *Bevan* v. *Waters* (3), and by this court in *Scarfe* v. *Morgan* (4), is, that by the general law, in the absence of any special agreement, wherever a party has expended labour and skill in the improvement of a chattel bailed to him, he has a lien upon it. Now the case of agistment does not fall within that principle, inasmuch as the agister does not confer any additional value on the article, either by the exertion of any skill of his own, or indirectly, by means of any instrument in his possession, as was the case with the stallion in the case last cited; for he simply takes in the animal to feed it. In addition to this, we have an express authority (5), that an agister has no lien, and although possibly the point may have been decided on the special ground that there had been an agreement between the parties, or a conversion of the animal had taken place, still it is also quite possible that it might have been on the more general principle, that no lien can exist in the case of agistment; and it was so understood and acted upon

(1) *Chapman* v. *Allen*, Cro. Car. 271.
(2) *Jackson* v. *Cummins*, 5 Mee. & W. 342.
(3) 3 Car. & P. 520; M. & M. 236, *S. C.*
(4) 4 Mee. & W. 283; 1 Horn. & Hurl. 292, *S. C.*
(5) *Chapman* v. *Allen*, Cro. Car. 271.

subsequently by the court in *Judson* v. *Etheridge* (1). The analogy also of the case of the livery stable-keeper, who has no lien by law, furnishes an additional reason why none can exist here; for this is a case of an agistment of milch cows, and from the very nature of the subject-matter, the owner is to have possession of them during the time of milking, which establishes, that it was not intended that the agister was to have the entire possession of the thing bailed; and there is nothing in the case to show that the owner might not, for that purpose, have taken the animals out of the field where they were grazing, if he had thought proper so to do. This claim of lien is, therefore, inconsistent with the necessary enjoyment of the property."

AUCTIONEERS.

Though there may be occasions in which auctioneers can rightfully claim and be entitled to lien in respect of their services, under the rule of law governing that right, yet a reasonable distinction has been taken between those cases where work is done on a chattel tending to improve it, or to increase its value; and those, where it has been merely delivered for a particular purpose, and with a purely different object.

Auctioneers have only common law right of lien for services.

An auctioneer, to whom a mortgage deed has been delivered for the purpose of obtaining payment of the principal and interest due thereon from the mortgagor, has, on this principle, been held to have no lien on the deed in respect of applications made in pursuance of his employment (2). No work in such case is done on the instrument to improve it, or to increase its value, so as

No lien on mortgage deed delivered to obtain payment from mortgagor.

(1) 1 Cr. & M. 743.
(2) *Sanderson* v. *Bell*, 2 Cr. & M. 304.

to support the right of lien. It is merely taken to be exhibited to the mortgagor, and to show an authority to demand and receive the money due upon it.

COACHMAKERS.

Coachmakers have specific lien.

Coachmakers have a specific lien upon carriages sent to them for the purpose of repair (1). Lord Ellenborough, C. J., in his judgment, *Rushforth* v. *Hadfield* (2), would seem to have doubted this power, but his Lordship was then deciding a claim to general lien, and may therefore reasonably be supposed to have alluded to such extended right, and not to the more limited claim in respect of particular repairs.

Set-off no answer to such right.

But whatever might have been his Lordship's opinion as to the validity of a coachmaker's particular lien, subsequent decisions have placed this point beyond the possibility of doubt. Thus, in an action of trover, for the recovery of certain iron-work, the defence to which was a lien for the work done; it was held, not only that the lien existed, but that a claim of set-off to a larger amount on the part of the plaintiff, was no answer to the lien, unless it had been agreed between the parties that one should be deducted from the other (3).

Nor is it defeated by judgment recovered against purchaser on neglect to take carriage away.

It has been also held, that if a carriage be ordered from a coachmaker to be paid for partly by cash on delivery, and partly by a bill at a date specified, and on the purchaser's neglect to take the carriage away, the coachmaker obtains a verdict against him *for goods bargained and sold*, the coachmaker has a lien upon the carriage for the sum due, and the sheriff cannot

(1) *Houlditch* v. *Milne*, 3 Esp. Rep. 86.

(2) 7 East, 220.

(3) *Pinnock* v. *Harrison*, 3 Mee. & W. 532; and see *Green* v. *Shewell*, mentioned in judgment, *Scarfe* v. *Morgan*, 4 Mee. & W. 277; 1 Horn. & Hurl. 292, *S. C.*

seize it under a *fieri facias* against the goods of the purchaser (1).

Repairs done for servant without authority of master, do not entitle to lien.

But, if a coachmaker repair a carriage which has been broken by the negligence of the servant, without any communication with, or authority from the master, for whom he has not been previously in the habit of working, he has no right to retain it against the latter, for the expense of the repairs (2).

Claim for standage not tenable, except under express agreement, or carriage left unreasonable time.

Nor can he claim any right of detainer for standage, unless there be an express contract to that effect, or the owner leaves his property on the premises beyond a reasonable time, and after notice has been given him to remove it (3).

Parting with possession divests lien.

And if, after the repairs have been completed upon proper authority, the coachmaker allows the owner, from time to time, to take the carriage away, he thereby relinquishes possession, and cannot, if it be afterwards brought to his premises, retain it for the amount due (4).

And a mere agreement otherwise is only binding against purchaser, not against transferee.

Nor will an agreement to pay for a coach by four bills of exchange, and that the coachmaker shall "have a claim upon the coach until the debt is duly paid," authorize resumption of the coach, after the death of the customer; for such agreement amounts only to a personal license, and would not be available against any person to whom the purchaser might transfer it. Hence, after the death of a purchaser, who had entered into an agreement to this effect, it was held not to be enforceable against his administrator, to whom the property came by operation of law, and that the coachmaker was therefore not justified in detaining the coach, which subsequently came into his possession for the purpose of repair (5).

(1) *Houlditch* v. *Desanges*, 2 Stark. Rep. 337.
(2) *Hiscox* v. *Greenwood*, 4 Esp. Rep. 174.
(3) *Hartley* v. *Hitchcock*, 1 Stark. Rep. 408.
(4) *Ibid.*
(5) *Howes* v. *Ball*, 7 B. & C. 481; 1 Man. & R. 288, *S. C.*

DYERS, CALICO PRINTERS, AND BLEACHERS.

Dyers have, *in general*, only a particular lien.

Dyers have, *in general*, no lien beyond that which is vested in them by the general rule of law, and have, therefore, no power of detention of any article delivered to them to be dyed, for a general balance of accounts accruing from work done in the course of their trade. Their right extends only to the particular price of dying the articles in their possession, unless there be an express agreement authorizing a further claim (1).

Contrary decisions in particular cases.

It has however been contended, that decisions to the contrary have been established in particular cases, and this argument was used in *Rushforth* v. *Hadfield* (2), and again in *Whitehead* v. *Vaughan* (3). In one case, at Nisi Prius (4), tried before Lord Kenyon, the claim to a general lien was certainly allowed; but the question went to the jury upon the strongest evidence of the usage of trade in the particular place in question, in favour of such lien. A later case is mentioned in a note to *Rushforth* v. *Hadfield*, of *Close and another*, assignees of *Ridell*, v. *Waterhouse and others*, which was an action of trover for woollens delivered by the bankrupt before his bankruptcy to the defendants, dyers at Halifax, to be dyed, where a tender had been made of the price of dying the particular goods; but the defendants claimed to retain for their general balance for the expense of dying other goods, on the ground of usage; and the jury, at the trial before Rooke, J., at York, negatived any such usage at Halifax, and found a verdict for the plaintiffs; and on a motion for a new trial, in Trin. Term, 42 Geo. 3, the Court of King's Bench finally discharged

(1) *Green* v. *Farmer*, 4 Burr. 2214; 1 Wm. Bl. 651, *S. C.*; *Bennett* v. *Johnson*, 2 Chit. Rep. 455.

(2) 6 East, 522.

(3) See note to *Rushforth* v. *Hadfield*, 6 East, 522.

(4) *Savill* v. *Barchard*, 4 Esp. Rep. 53.

the rule, being of opinion that, as the usage was negatived, the defendants could not retain for the price of dying any other than the particular goods dyed, or at most, only for the dying of such goods as were delivered to them at one and the same time, under one entire contract; and that, at any rate, the circumstance of the defendants' having had different parcels of goods in their hands at one time, which had been delivered at several times, did not give them a lien on the goods in question remaining in their hands for the price of dying such other distinct parcels as had been returned to the owner. Another Nisi Prius decision is also mentioned by Mr. Montague in his Bankrupt Law (1), as having been tried before Lawrence, J., at the Gloucester Summer Assizes, 1803, in which the right of dyers to a general lien was again agitated, and the jury found, upon the evidence of almost all the dyers in that county, as well as of others from different counties, that the custom was proved (2).

It seems, however, to be now clearly settled that there is no general usage of trade which entitles them to retain such goods for any thing beyond the particular demand against the owner; and that they cannot maintain a claim to a lien for a general balance for work done in the course of their trade, unless there be an express agreement for it.

There is no general usage entitling them to more than a particular lien.

The result of these decisions demonstrates the fact that the usage of the trade, in this respect, varies in different places, and though the claim of detention for general balances is not maintainable in some counties, in others, evidence may be afforded sufficiently strong to establish the existence of the right.

A general lien possibly exists partially by usage.

But the right of general lien, it has been shown, may be acquired in the case of dyers and others, by resolu-

May be acquired by contract with customers.

(1) *Humphreys* v. *Partridge*, Mont. B. L. vol. 4, p. xviii., note (*a*).

(2) See note (*e*) in *Rushforth* v. *Hadfield*, 6 East, 522.

tions of the trade to that effect, publicly advertised by them and assented to by their customers. Thus where in pursuance of a resolution of a public meeting of the dyers, dressers, whitsters, printers, and calenderers of Manchester and the neighbourhood, notice was given to their various customers that a general lien would be claimed, for outstanding balances, upon all goods thenceforward coming into their hands, in the course of trade, it was considered, that parties subsequently delivering goods must have assented to the terms of it (1).

Calico-printers have a general lien.

The right of lien pertaining to calico printers is more extensive. They have not only a particular lien upon the cloth placed in their possession for the execution of the purposes of their trade, for work done upon it, but also for a general balance due for printing other cloth for the same employer (2).

And for duties paid.

This right was early established, and the lien was held to extend not only to the bare charge of printing, but to the duties paid by the printer in respect of the process.

Thus, one Tolfrey, a linen-draper, was indebted to Andrews, a calico-printer, for printing and other work done by him on divers parcels of cotton and linen, and also for money paid and advanced to the collectors for the duty on part of the linens. Tolfrey subsequently became bankrupt, and was, at the time, indebted to Andrews in a sum exceeding £300. Andrews had linens in his hands belonging to the bankrupt, and sent to him by the latter to be printed, of the value of upwards of £100, and refused to deliver them up to the assignees, on the ground that he had a lien upon them for such general amount in respect of the work done, and duties paid upon them; and it was held, that he should retain

(1) Vide *ante*, p. 22, *Kirkman* v. *Shawcross*, 6 Term Rep. 14.

(2) *Weldon* v. *Gould*, 3 Esp. Rep. 268; S. P., *Webbe* v. *Fox*, Peake's Add. Ca. 167.

the value of the goods in his hands in part satisfaction of his debt, and should be at liberty to prove the residue under the bankrupt's estate (1).

And on goods of third party when ignorant who owner is.

So, where goods are delivered to a person to have them printed, and such person delivers them to a calico-printer for that purpose, being at the same time indebted to him on a prior account, the calico-printer may hold them against the owner, by virtue of his lien (2), if, at least, it appear that he was ignorant, when receiving them, to whom they actually belonged.

No lien extending beyond debts in respect of wrok.

But the lien of calico-printers for their general balance, is confined to that arising from work done by them in the course of their trade, and cannot be claimed for debts due from their employers for money advanced, as in the case of factors and packers, or for any other collateral matter (3), with the exception particularized above, in regard to the payment of duties upon the goods printed.

Bleachers' or whitsters' lien not defined.

No case has yet been before the courts in which the right of a whitster's or bleacher's lien has been questioned. The resolution, already alluded to, appears to have emanated from the whitsters, the calenderers, and the dressers, as well as from the dyers and the printers; and probably, since the period of that meeting, they have contrived to retain to themselves the powers of general lien there resolved upon, by continued notices to their employers.

The unwillingness, however, with which the courts sanction these "encroachments upon the common law," and the jealousy with which attempts of this kind are invariably viewed, render it absolutely necessary that parties, seeking to establish a power thus constituted, should show that the notice of their resolution has either

(1) *Ex parte Andrews*, Cooke, 460.
(2) See *Weldon* v. *Gould*, 3 Esp. Rep. 268.
(3) *Ibid.*

directly reached the hands of their employers, or must necessarily have come to their knowledge in the customary transaction of their business. Were either of these facts proved, there can be little doubt, that as between them and their immediate employers, the same doctrine would be maintained that was established in the case already referred to.

FARRIERS.—VETERINARY SURGEONS.

Farriers have a specific lien for shoeing horses.

Principles of public convenience which have imposed upon an innkeeper the obligation to receive a guest, and upon a carrier to convey the goods of persons requiring him, render it equally imperative on a farrier to shoe a horse if brought to him for that purpose (1), and the law, in each case, has invested the parties with a right of specific lien. A farrier may therefore detain the horse until the price of shoeing be paid or tendered (2); but his claim to a general lien for a prior balance, though never expressly before the court, received a strong and decisive negative from Lord Ellenborough, C. J., in the judgment delivered by him in *Rushforth* v. *Hadfield* (3), upon a like claim of carriers to a general balance. In repudiating such power in the latter, his Lordship observes, "if they are encouraged, the practice will be continually extending to other traders and matters, and the farrier will be claiming a horse sent him to be shod." It has been even doubted whether his Lordship did not intend his observation to apply as well to specific as to general lien, but the context of the judgment, and the

But no lien for a general balance.

(1) *Lane* v. *Cotton*, 1 Salk. 18.

(2) Bac. Abr. Trover (E.), p. 694; *Muspratt* v. *Gregory*, 1 Mee. & W. 641.

(3) 7 East, 229.

nature of the claim then before the court, afford no authority for such construction.

A farrier or veterinary surgeon possesses a similar right of lien on cattle sent to him for the expenses and charges incurred in the application of his skill and labour in curing them of any disease.

Similar right for charges in attending or curing cattle of disease.

The only fetter to his right in this respect is the difficulty arising out of the circumstance, that as the subject on which the lien is claimed is a living chattel, it may become expensive to the detainer; but the question as to whom the liability to feed it immediately falls upon has been answered by the analogous case of a distress kept in a pound covert, where the distrainer must take reasonable care of the chattel distrained, whether living or otherwise (1).

It was formerly held that if a farrier entered into a special agreement for the payment of a specific price or reasonable sum for the cure or keep of a horse, he could have no lien on it; such agreement amounting to a waiver of any right he might otherwise possess (2). An agreement to that effect would not now, however, be deemed a waiver of the right of lien, unless it contained terms of future payment inconsistent with any present right of detention (3).

Contract for specific sum no waiver of lien.

FULLERS.

Fullers have a specific, but not a general lien, upon all goods delivered to them in the course of their business (4).

Fullers have specific lien upon goods delivered in the course of business.

And by the local custom of the trade of a fuller in

(1) *Scarfe* v. *Morgan*, 4 Mee. & W. 284; 1 Horn. & Hurl. 292, *S. C.*
(2) *Brennan* v. *Currint*, Say. 224; Selw. N. P.
(3) *Chase* v. *Westmore*, 5 M. & S. 180.
(4) *Rose* v. *Hart*, 8 Taunt. 409; 2 Moore, 547, *S. C.*

And by *local* custom, for a general balance.

Exeter, it would appear, he may claim a lien upon the property of his employers intrusted to him in the course of his trade, not only for debts arising in the execution of the purpose for which the property was delivered, but for a general balance due from his employers (1).

May also reserve a general lien by agreement.

He may also reserve to himself by special agreement, the general lien available in other cases. But, a stipulation, that all goods on hand shall be subject to a lien for a general balance, does not authorize the detention of articles used incidentally in the process of manufacture. Thus, where wool and cloth were sent to be scribbled and fulled, and certain oil and dying materials were also sent to the mill to be used by the owner of the goods for the purpose of dying them, preparatory to their being made into slubbing; the owner having a key of the oil cask, but the fuller and his customers having access to the room at all times; it was held, that these were not goods on hand, and therefore not subject to the claim of general lien (2).

Actual possession essential to maintain lien.

As in other cases, so in that of a fuller, actual possession of the goods is essential to the exercise of the right of lien.

If possession given up, lien cannot be revived.

No person, therefore, having a lien on goods, and subsequently parting with the possession, can afterwards stop them in transitu, and thereby revive his lien against the owner. Thus, where a fuller claiming a lien upon goods under a particular custom in Exeter, afterwards delivered them to a ship-carrier, to be conveyed on account, and at the risk, of his principal, though unknown to the carrier, it was held, that he could not recover his lien by stopping the goods in transitu, and procuring them to be re-delivered by virtue of a bill of lading signed by the carrier in the course of his voyage (3).

(1) *Sweet* v. *Pym*, 1 East, 2.
(2) *Cumpston* v. *Haigh*, 2 Bing. N. C. 449; 1 Hodges, 373, *S. C.*
(3) Per Lord Kenyon, in *Sweet* v. *Pym*, 1 East, 2.

INNKEEPERS.

An innkeeper possesses only the right of specific lien for debts accruing contemporaneously with possession; in other words, he has the right of detention of the luggage, horses, or carriages of his customer for such debt only as is incurred during the time they remain in his keeping (1), and his rights in respect of such lien are, by the general custom of the realm, similar to those in other cases. There are, however, exceptions in favour of London and Exeter, by the particular customs of those places, conferring upon innkeepers a power of sale over the lien, which does not exist elsewhere. It was formerly considered too that an innkeeper possessed not only a right of lien on the property of his guest, but a power of personal detention till payment. This preposterous doctrine, supported only by the *obiter dictum* of Mr. Justice Eyre, in the case of *Newton* v. *Tring*, reported in 1 Shower's Reports, 269, and the yet weaker authority of a case mentioned by Mr. Wentworth, in his Precedents of Pleading, has since been overruled by the recent case of *Sunbolf* v. *Alford* (2). The acknowledgment of such a principle would have been a direct violation of the law of arrest, for by the recognition of it, a debtor, however trifling the amount of his liability, might have been subjected to imprisonment without even process of law. This case has decided another point, that the goods of the guest are liable to such lien, only when in the actual possession of the innkeeper. Hence the clothes on his person are not seizable; for a trespass and detention of

Innkeepers have only a specific lien.

Power to sell lien by custom of London and Exeter.

Formerly considered to have right to detain person of guest.

Now decided otherwise.

Clothes on person of guest not seizable.

(1) *Jones* v. *Thurlow*, 8 Mod. 172; Bac. Abr. "Inns and Innkeepers;" *York* v. *Grindstone*, 1 Salk. 388: *Nayler* v. *Mangles*, 1 Esp. Rep. 109.

(2) 3 Mee. & W. 248; 1 Horn. & Hurl. 13, *S. C.* The Q. B. had previously decided a similar question in a case not reported; and see *Wolf* v. *Summers*, 4 Camp. 631, where it was held that lien attached against the luggage of a passenger for his passage-money, but not against his person, or clothes in actual wear.

the person would of necessity be the result of any attempt to acquire that foundation for his lien; and for the like reasons, a basket or bundle in his hand is protected against the lien of the innkeeper.

Who are innkeepers.

This right of lien in favour of innkeepers extends to all persons keeping houses of public entertainment in London, where provisions and beds are furnished to persons applying and paying for them, but which are usually termed taverns and coffee-houses, and are not frequented by stage-coaches or waggons, and have no stables attached to them; and they are notwithstanding considered innkeepers, and subject to their privileges and liabilities (1).

Previous demand of payment not requisite.

A previous demand of payment from the guest is not necessary to entitle a party to an exercise of this right;

Who are guests.

and any person, obtaining lodging or food for himself, or stabling and livery for his horse or other cattle, is considered a guest, in respect of the same, so as to constitute

Persons leaving animals requiring to be fed.

a right of lien in the innkeeper (2). The mere act of leaving an animal requiring to be fed is, in fact, sufficient for such purpose; nor will the circumstance that it has

Lien against, when stolen.

been stolen (3), or otherwise improperly obtained by the guest, deprive the innkeeper of such remedy, unless it be shown that he received it into his stable with a know-

Against rightful owner.

ledge of the fact. So, he possesses a lien on a horse for his keep against the rightful owner, although wrongfully seized under colour of a legal proceeding, unless he knew that the party making the seizure was a wrong doer at the time it was made (4); nor is such lien forfeited by putting the horse out to grass (5).

If credit given to guest, lien gone.

If, however, an innkeeper, waiving the privileges vested in him by law, give credit to a guest, and allow him to

(1) *Thompson* v. *Lacy*, 3 B. & Ald. 283.

(2) *York* v. *Grindstone*, 1 Salk. 388; 2 Ld. Raym. 866, *S. C.*; Holt, C. J., dissentiente.

(3) *Yorke* v. *Grenaugh*, Ld. Raym. 866.

(4) *Johnson* v. *Hill*, 3 Stark. Rep. 172.

(5) 2 Roll. Abr. 85.

leave the house without payment, he cannot afterwards detain either the goods of the guest or the horse, but must resort to his remedy by action at law (1). The lien, in such cases, attaches for the debt only which arises from the thing itself, and not for any other debt due from the same party.

The right of lien, when thus exercised, does not vest in the party detaining, a right to sell for the amount due (2), except under the custom of the places before-mentioned. By such customs, viz. of London and Exeter, when a horse has eaten out its worth, the innkeeper may, upon the reasonable appraisement of four of his neighbours, sell it, or take it as his own (3).

No general right to sell.

The only other restriction, attaching to innkeepers beyond those arising from the general principles applicable to lien, is imposed by the stat. 11 & 12 W. 3, c. 15, s. 2, entitled "An Act for the ascertaining the measures for retailing ale and beer," by which it is enacted, "that if any innkeeper, or alehousekeeper, victualler, sutler, or retailer of ale or beer, shall sell any ale or beer in any vessel not signed, stamped, or marked according to the provisions of the preceding section of that act, to any traveller or other person; or if, in giving any account or

If ale sold in vessel not stamped, &c. or account not given of quantity, &c. to guest, no lien attaches.

(1) *Jones* v. *Pearle*, 1 Str. 556; *Jones* v. *Thurlow*, 8 Mod. 172.

(2) *Jones* v. *Pearle*, 1 Str. 556. In case *de Hoteler*, Yelv. 67, Popham, C. J. says, that an innkeeper cannot sell a horse for his keep, where the price of it has been agreed upon, though he may do so if there has been no agreement for the price; but the power of sale in the case here put has been since denied. See per Lord Ellenborough, C. J. in *Chase* v. *Westmore*, 5 M. & S. 185.

(3) *Moes* v. *Townshend*, 3 Bulstr. 271, and Bac. Abr. tit. "Inns and Innkeepers," and *Robinson* v. *Walter*, 3 Bulstr. 269. "The custome of London as to innekeepers is this. If one brings a horse to an inne, leaves him there, and goes his way, and the horse eats up more than his price, by the custome of London, the innekeeper may sell this horse to pay himself (but not if the debt was for other horses)." "The custome of London is good and reasonable how long to stay, not till he eats out more than his head: the innholder may sell him presently, and this is justifiable."—Per Montague, C. J.

reckoning in writing, or otherwise, such innkeeper or alehousekeeper shall refuse to give in the particular number of quarts or pints of ale or beer for which the demand is made on such account: it shall not be lawful for any such innkeeper or alehousekeeper for default of payment of such reckoning to detain any goods, or other things belonging to the person from whom such reckoning shall be due, but he shall be left to his action at law for the same, any custom or usage to the contrary in anywise notwithstanding."

Lien may exist for pecuniary advances by special agreement.

Besides his lien on the goods of a guest for his own personal board, lodging, wine, &c. an innkeeper may secure to himself an additional lien for all pecuniary advances by special agreement at the time of making such advances, and a *fieri facias* delivered to the sheriff against the guest will be subject to the lien of the landlord for the whole amount (1).

LANDLORDS AND TENANTS.

No lien on goods distrained and replevied.

A landlord has no lien on goods taken under a distress for rent, and subsequently replevied by the tenant. His remedy, in such case, is confined to the replevin bond (2).

Lien of assignees of bankrupt tenant on buildings erected by him.

A tenant, who had become bankrupt, had previously agreed in writing to take a lease of a manufactory for a term of years, and the landlord had agreed to erect, at his expense, certain buildings, upon the bankrupt's paying as an additional rent £7 10*s.* per cent. upon the amount so expended. The buildings, however, were subsequently erected by the bankrupt on the verbal assurance of the landlord that the bankrupt might deduct the amount expended from the rent. The assignees

(1) *Procter* v. *Nicholson*, 7 Car. & P. 67.
(2) *Bradyll* v. *Ball*, 1 Bro. C. C. 427.

elected not to adopt the agreement for the lease, but refused to deliver up possession (1) to the landlord, unless he allowed them the sum which the bankrupt had expended on the buildings. It was held, that as both the written and verbal agreement between the landlord and the bankrupt contemplated a continuance of the tenancy, which the assignees had themselves repudiated, they had no lien on the premises for the money expended by the bankrupt (2).

LETTER-PRESS PRINTERS, PUBLISHERS, AND ENGRAVERS.

Lien of a publisher, &c. is specific.

The lien of a printer and publisher is specific, but if he be employed to print various numbers, though not consecutive, of an entire work, he has a lien upon all the copies not delivered, for the general balance due for printing the whole of the numbers (3).

No lien on stereotype plates for printing.

He has, however, no lien on stereotype plates put into his hands to print from, for sums due for printing. In trades, long established, observed Tindal, C. J., such an usage may not improbably have grown up, but it requires strong evidence to show its existence in a new trade like that of stereotype printing, which has sprung up within a short period, and in which, it is not very probable, that any such usage has yet been established (4).

But may have for money paid for manufac. turing plates.

But though it was decided that he had not this right of lien, in respect of sums due for printing, it was at the same time ad-

(1) By stat. 6 Geo. 4, c. 16, s. 75, "if the assignees shall not, upon being thereto required, elect whether they will accept or decline a lease or agreement for a lease; the lessor or person agreeing to grant the lease, or any person entitled under such lessor or person, shall be entitled to apply by petition to the Lord Chancellor, who may order them to elect, and to deliver up such lease or agreement, in case they decline the same, and the possession of the premises, *or may make such other order therein as he shall think fit.*"

(2) *Ex parte Ladd, re Ryland*, 3 Deac. & Chit. 647.

(3) *Blake* v. *Nicholson*, 3 M. & S. 167.

(4) *Bleaden* v. *Hancock*, M. & M. 465; 4 Car. & P. 152.

mitted, that he possessed it, by way of security, for the expense of manufacturing the plates, which is generally incurred by the stereotype printer.

On copyright for disbursements.

It would seem, too, that when an author agrees with a bookseller to publish his work, and to allow him interest for the money he shall advance, and also a share of the profits, the bookseller has a lien on the copyright for his disbursements (1).

Engravers have specific lien.

An engraver has a specific lien on the etchings, pictures, impressions, and prints in his possession for the work done upon them (2).

LIVERY-STABLE KEEPERS.

Livery-stable keepers have no lien by law, but may have by agreement.

A livery-stable keeper, not being an innkeeper, has not, by law, a lien for the keep of horses, unless by special agreement with the owner of them (3). But if such agreement be made, and the owner remove them to defraud the keeper of his lien, the latter may retake them without force, and upon such re-possession, his lien will revive (4). So, where a mare was placed with a livery-stable keeper, who advanced money to the owner, and it was agreed that she should remain as a security for the repayment of the sum advanced, and for the expenses of her keep, the stable-keeper was held to have a lien on the mare for the amount due (5).

Distinction between mere livery, and training.

A distinction has, however, been taken between cases where horses are sent merely for the purposes of livery, and those, where training has been the primary motive. In the latter case, a livery-stable keeper has been consi-

(1) *Brook* v. *Wentworth*, 3 Anst. 881.

(2) *Marks* v. *Lahée*, 3 Bing. N. C. 408. Sed quære, whether he can detain them for sums due under separate and distinct contracts.

(3) *Judson* v. *Etheridge*, 1 Cr. & M. 743; and see *Chapman* v. *Allen*, Cro. Car. 271; and *Anderson* v. *Bell*, 2 Cr. & M. 304.

(4) *Wallace* v. *Woodgate*, R. & M. 193; and *Yorke* v. *Grenaugh*, 2 Lord Raym. 866.

(5) *Donatty* v. *Crowther*, 11 Moore, 479.

dered to be entitled to the lien attaching to trades in general (1), and a trainer of horses can of course claim a similar lien for the bare charges of exercising and training (2). The doctrine of the common law is, that where a bailee expends labour and skill in the improvement of the subject delivered to him, he has a lien for his charge, and the like principle vests in the trainer a lien for the expense and skill bestowed in bringing the horse into condition for running at races (3). The generality of this doctrine may however be restricted by the circumstances under which the horse is sent to be trained; and it seems to be doubted (4) whether the usage of training was sufficiently explained, when the general right of a trainer was held, and whether the doctrine would apply where the animal delivered was a race-horse; the owner having, in such cases, a right, during the continuance of the training, to take the animal away for the purpose of running races for plates elsewhere. In expressing such doubt, Mr. Baron Parke stated, however, that his observations did not apply to those cases where the horse was delivered to be trained for the purpose of running a particular race. In the former case, by the essence of the contract, the trainer has no right to the uninterrupted possession of the horse; in the latter, he has such right during the time his labour is expended upon him.

Trainers have a particular lien.

Subject to particular exceptions, where owner has a right to occasional possession of horse.

The same doubt had been previously expressed in a rather earlier case by Mr. Baron Alderson, who observed, that it might be very doubtful whether the trainer would not be considered to be in the situation of a livery-stable keeper, if, by the contract he was to allow the owner to run the horse (5).

(1) *Bevan* v. *Waters*, 3 Car. & P. 520; M. & M. 236, *S. C.*
(2) *Jacobs* v. *Latour*, 5 Bing. 130, *S. C.*; 2 M. & P. 20.
(3) *Jackson* v. *Cummins*, 5 Mee. & W. 342.
(4) *Ibid.*, per Parke, B.
(5) *Scarfe* v. *Morgan*, 4 Mee. & W. 270; 1 Horn. & Hurl. 292, *S. C.*

Lien attaches when a mare is sent to a stable for the purpose of being covered.

So, if a mare be sent to the stables of a farmer, livery-stable keeper, or other person, for the purpose of being covered by a stallion belonging to the owner, the latter is entitled to a specific lien on her for the charge for covering her. The object is, that the mare may be made more valuable by proving in foal. She is delivered, that by the skill and labour of these persons, and the use of their stallion for that object, she may be made so, and it is equally a case that falls within the principle that the expenditure of labour and skill in the improvement of a chattel, affords a title to lien (1). In the discussion of the question under which this novel decision arose, the point was mooted as to the liability of the detainer of a living chattel to feed it intermediately; but Mr. Baron Parke, in delivering judgment, considered the difficulty as satisfactorily answered by the analogous case of a distress kept in a pound covert, where he who distrains is compellable to take reasonable care of the chattel distrained, whether living or inanimate; and to the case of a lien upon corn, which requires some labour and expense in the proper custody of it.

MILLERS.

Right of lien attaches on all goods, &c. in possession under one contract.

A miller may exercise a right of detention over all parcels sent to him in the course of his occupation. And if a quantity of wheat be sent to be ground at different times, but under one contract, he has power to detain the whole till payment of the price agreed upon (2). The power of millers has been admitted, to this extent, upon the broad principle that every workman who bestows labour upon a chattel, in consideration of a reward, has inherently such right; and that where no day of payment is given, the payment of the price, and

(1) *Scarfe* v. *Morgan*, 4 Mee. & W. 270; 1 Horn. & Hurl. 292, *S. C.*
(2) *Chase* v. *Westmore*, 5 M. & S. 180.

delivery of the chattel shall be concurrent acts. They have not, it would seem, any lien for the general balance due from their employers. Accordingly, where a flour factor employed a miller, who had always a large quantity of corn, and a number of sacks belonging to the former in his hands, and the miller trusted the flour factor to so large an amount that, when he became bankrupt, he owed the miller £286 for grinding done before, and £16 for grinding corn then in hand; and it was insisted by the miller that he had a lien upon the corn and sacks for the whole debt; Lord Hardwicke held, that no evidence having been afforded of a contract for a specific lien, nor for a lien arising from the general usage of trade, he could retain only for the price of grinding the corn then in his hands (1).

But not for a general balance.

And where goods have been sold by a miller under circumstances which give him the right of refusing to deliver them, evidence of the insolvent state of the buyer's circumstances cannot be received in an action of trover, brought by the indorsee of the bill of lading against the wharfingers of the miller, unless such evidence can be brought home to the knowledge of the plaintiff himself (2).

MORTGAGORS AND MORTGAGEES.

It not unfrequently happens that title-deeds are deposited in the hands of a person intending to advance money to the owner of them, for the purposes of investigation preparatory to the proposed mortgage, and it might not have seemed unreasonable, nor inconsistent with the general principles of lien, that in such cases,

Deeds deposited for investigation cannot be held as lien for the cost.

(1) *Ex parte Ockenden*, 1 Atk. 235; *Green* v. *Farmer*, 4 Burr. 2214; 1 W. Bl. 651, *S. C.*

(2) *Holliday* v. *Mann*, 2 Car. & P. 509.

the intended mortgagee should have been entitled to a lien on the deeds, in respect of the costs thereby incurred, whether by his individual trouble, or by the employment of an attorney on his behalf. The courts, however, have decisively negatived such right, and held, that under like circumstances, the intended mortgagee cannot, by any law or usage, claim a lien in respect of the expenses, even though the deposit of the deeds be accompanied by an explicit offer on the part of the proposed mortgagor to defray the costs (1).

A mere usage for mortgagor to pay expenses insufficient to entitle mortgagee's attorney to lien.

It follows, therefore, of necessity, that the mere usage that a mortgagor shall pay the expenses of the mortgage, is insufficient to establish the requisite privity between the mortgagor and the attorneys of the mortgagee to enable them to retain the deeds for the expenses incurred (2). The mortgagee would otherwise be able to communicate a right, with which his own is not commensurate, a power utterly at variance with all authority (3).

PACKERS.

Lien for general balance.

By the usage of trade, packers are entitled to a lien for the general balance due to them from their employers.

And for money advanced.

This decision arose under an early and important case brought before the court, in which evidence was adduced not only of a general custom in favour of such lien in respect of the packing itself, but of loans of money made by the packers. Being in the nature of factors (4), and, like them, in the habit of advancing money to their em-

(1) Parke, J., *Pratt* v. *Vizard*, 5 B. & Ad. 812; 2 Nev. & M. 455, *S. C.*
(2) *Pratt* v. *Vizard*, *supra*.
(3) *Hollis* v. *Claridge*, 4 Taunt. 807.
(4) *Green* v. *Farmer*, 4 Burr. 2222, *S. C.*; 1 Wm. Bl. 651.

ployers, it was not unreasonable that they should be allowed co-extensive powers of lien for securing repayment, and accordingly it was held, that they had the right to detain the goods in their possession not only for the general balance arising from the work done, or expense incurred in respect of them, but for the loan also (1).

TAILORS.

Tailors have a specific lien.

A tailor, employed to make a suit of clothes, has a lien for the whole price upon any part (2), or, on the cloth placed in his hands for that purpose (3), yet he has no right to sell the article detained, in default of payment (4). And since liens may be derived through the authorized acts of servants and agents, if a servant deliver cloth to a tailor, to make his master's liveries, the tailor will have a lien for the value of his work; yet if the servant pay the tailor his charge, that will not give to the servant a lien on the liveries (5).

Possession not lost by allowing customer to try the clothes on.

But, though a lien be claimed in respect of work bestowed in the making of a suit of clothes, it would seem, that a tailor would be bound to give his customer an opportunity of trying it on, and if done in his presence, he would not thereby forfeit his lien (6).

TITHE-OWNERS.

Tithes a lien unless a composition have taken place.

Tithes due in respect of the produce of land taken possession of by sequestrators, by whom such produce has

(1) *Ex parte Deeze*, 1 Atk. 228.

(2) *Blake* v. *Nicholson*, 3 M. & S. 169, per Lord Ellenborough, C. J.

(3) *Ex parte Ockenden*, 1 Atk. 234; *Chapman* v. *Allen*, Cro. Car. 271; *Hartford* v. *Jones*, Ld. Raym. 393.

(4) *Hostler's case*, Yelv. 66.

(5) *Hussey* v. *Christie*, 9 East, 433, per Lord Ellenborough, C. J.

(6) *Hughes* v. *Lenny*, 5 Mee. & W. 187, Per Parke, B.

been paid into court, are payable out of the fund; but, they are otherwise where a composition has taken place; for, by such act, no lien is established upon the land; a mere personal demand is created, recoverable at law (1).

TRUSTEES.

Lien on trust estate.

Trustees are allowed a lien upon the trust estate for their expenses (2), but no such right pertains to an agent appointed by the trustees (3).

Where party having struck a docket, becomes assignee under an assignment in trust for creditors, and a *fiat* is issued, he has no lien for expenses.

Where a party has struck a docket against a bankrupt, but has subsequently abandoned it and entered into an arrangement under which he becomes a trustee upon an assignment of all the bankrupt's property, in trust for the creditors, and after incurring considerable expenses in execution of the trust, a *fiat* is issued by a second creditor, under which the property assigned is seized by the assignee, he can substantiate no lien on the property as against the assignee; for the docket struck by him affords *primâ facie* evidence of his having had notice of an act of bankruptcy prior to the trust assignment, and the assignment itself amounted to such act (4).

WHARFINGERS.

Wharfingers have a general lien.

The law having imposed upon wharfingers the burden, as it were, of receiving and conveying goods when required, has also invested them with the power of retaining them as a general indemnity against existing debts. The case of a wharfinger is precisely that of a factor; he has the same lien, and their interests are precisely the

(1) *Dickenson* v. *Smith*, 4 Mad. 177.
(2) *Trott* v. *Dawson*, 1 P. Wms. 780.
(3) *Worrall* v. *Harford*, 8 Ves. J. 4.
(4) *Ex parte Swinburne*, 3 Deac. 396; 1 Mon. & Chit. 119.

same, because the wharfinger has a right to hold the goods as against all the world, and to pay himself to the fullest extent (1). And this right has been acknowledged, even as against the crown; for as a derivative title cannot mount higher than the title from which it is derived, so the crown cannot seize, under an extent, more than the actual interest of the crown debtor. The wharfinger's general lien on the goods of a customer in his possession, for his general balance, in respect of freight and wharfage due before the teste of an immediate extent issued against such customer being the crown's debtor, will, therefore, prevail against the extent (2).

Such right prevails against extent by the crown, if for wharfage due before teste of writ.

This right of general lien seems to have been long established and acted upon. In a case, where the whole question turned upon this point, Lord Kenyon observed, that a lien from usage was a matter of evidence, and that the usage in these cases had been proved so often that it should be considered as a settled point that wharfingers had the lien contended for (3). And, in a more recent case (4), Lord Eldon, referring to the decision of Lord Kenyon, observed that he should hold it as the settled law on the subject; and when it was objected by the counsel for the defendant, that it appeared that the balance which the defendant claimed to be due, and under which he entitled himself to a lien, had accrued some years before, and so was barred by the Statute of Limitations, Lord Eldon observed, that though the statute

Has been long established.

Not affected by Statute of Limitations.

(1) *Rex* v. *Humphery*, 1 M'Clel. & Y. 188.

(2) *Ibid.* The court were divided in opinion whether a wharfinger's lien for *warehouse-room* stood on the same footing, but, where a wharfinger detained goods on his premises, seized there under an immediate extent, in respect of a lien for wharfage, which was afterwards established, his claim for warehouse-room from the teste of the extent till the forcible removal of the goods was allowed. See *Syeds* v. *Hay*, 4 Term Rep. 460, *post*, p. 359.

(3) *Naylor* v. *Mangles*, 1 Esp. Rep. 110.

(4) *Spears* v. *Hartley*, 3 Esp. Rep. 81.

had run against the demand, if the creditor obtained possession of the goods on which he had a lien for a general balance, he might hold them for that demand by virtue of the lien (1).

Right depends on title of consignee.

The title of a wharfinger to lien, depends, however, as in all other cases, upon the title, and extent of the right, of the consignee against whom he claims. He cannot, therefore, set up a lien for a general balance of accounts on goods which are directed by mistake to a customer, or which arrive at the wharf subsequently to the rescinding of the contract under which they have been sent to him. Nor is it essential, in such case, that the consignee shall have informed the wharfinger of the determination of the contract. Where, therefore, a merchant shipped goods to London to the order of B., who, before their arrival, wrote to say, that he was in failing circumstances, and would not apply for the goods on their arrival; whereupon the merchant returned a general answer, without making any mention of the goods, but left immediately for London, and applied to the wharfinger, at whose wharf the goods had meanwhile arrived (and where the goods of B. were usually landed and kept till sent for by him), tendering the freight and charges paid for the goods, and requiring a delivery of them, which was refused, unless upon payment to the wharfinger of the general balance due from B. for wharfage; it was held, that the contract between the merchant and B., having been rescinded previously to the arrival of the goods, the wharfinger had no right to detain them against the merchant, for such general balance. Had the wharfinger, however, accepted bills on the faith of the goods, he would have had a right to retain them to that extent, for the consignee had become invested by the merchant with a power to make

If contract rescinded before transit ended, lien for general balance will not attach.

But if wharfinger accept bills for the consignee meanwhile, lien attaches for such.

(1) See *ante*, p. 13, as to the operation of the Statute of Limitations against remedy.

them liable to such a claim (1). Or if an act of bankruptcy had intervened, between the offer to rescind, and the assent of the merchant, the assent would have come too late to prevent the operation of the act of bankruptcy (2).

So, general lien attaches if bankruptcy of consignee occur before contract rescinded.

Unless the right of lien have antecedently attached in respect of a sum actually due for wharfage, a sale, in the *interim*, by the party claiming the goods, and who, by custom or by special contract, is bound to pay the wharfage dues, will defeat the right of the wharfinger to resort to detainer of the goods in case of the bankruptcy of the former. To admit a contrary right on the part of the wharfinger, under such circumstances, would be to vest in him a power over the property of third parties for the subsequent default in payment by others; a right, no less inconsistent with the title of the purchaser to immediate delivery of the goods, than with the agreement of the wharfinger himself, who, by postponement of the time of payment, has suspended his right of detainer (3).

Sale by consignee, prior to lien attaching, defeats the right.

So the non-delivery of a portion of the goods to a purchaser from the importer till after the wharfage dues have become payable, has been held not to alter the rights of the parties, for having at the time of the sale no right of lien, the subsequent non-delivery will not vest in the wharfinger any new right.

Non-delivery of a portion of goods under such circumstances no ground for lien.

This point was argued and decided under the following circumstances. A quantity of iron had been imported and landed at the defendant's wharf, and was subsequently purchased by Messrs. T., from the importers,

(1) *Richardson* v. *Goss*, 3 Bos. & Pul. 119; and see the old case of *Atkin* v. *Barwick*, 1 Str. 365, the authority of which has been preserved, though perhaps were a case precisely similar to it now to arise, it would receive the same decision (per Chamber, J., in case cited *supra*).

(2) *Smith* v. *Field*, 5 Term Rep. 402.

(3) *Crawshay* v. *Homfray*, 4 B. & Ald. 50.

who thereupon received an order for its delivery, and paid for it on the day following. It having been proved that by the custom of the trade, the wharfage charges were not to be paid for till the Christmas following, whether the goods had been removed in the mean time, or not, and part of the iron having been delivered to Messrs. T., and the importers having become bankrupts, subsequently to the Christmas, the remainder was detained by the wharfingers, who claimed a lien on it for the wharfage charges due from the bankrupts; it was held, that under such circumstances no lien could be claimed against the purchasers (1).

Lien does not attach till the goods are actually wharfed.

Nor does the right of lien attach on the goods till they are actually landed at the wharf; and consistently with this rule it has been decided, that wharfingers in London are not entitled to wharfage for goods unladen into lighters out of barges fastened to their wharfs (2). This was a special case argued before Lord Mansfield, C. J., founded on a trial at Guildhall, in an action on the case against the defendants for loading and unloading malt at plaintiff's wharf, without payment of the duties; it appearing that whilst the barge was fastened, and lay at plaintiff's wharf, a small part of the cargo was unloaded at the wharf, and the other part was taken out and put on board lighters, but never landed; and the question raised and negatived was whether, for this latter portion, the wharfage rates were payable or not.

Nor if wharfed contrary to the directions of owner.

And it reasonably follows, that if the goods be unloaded wrongfully at the wharf, the same objection prevails against the right of the wharfinger's claim. Where, for instance, the owner of goods on board a vessel, directed the captain not to land them on the wharf,

(1) *Crawshay* v. *Homfray*, 4 B. & Ald. 50; and see *Richardson* v. *Goss*, 3 Bos. & Pul. 119.

(2) *Stephen* v. *Coster*, 1 W. Bl. 413 & 423; 3 Burr. 1408.

against which the vessel was moored, and obtained his promise to that effect, but he, notwithstanding, delivered them to the wharfinger, under the idea that the wharfinger had a lien thereon for wharfage fees, because the vessel was unloaded against the wharf; it was held, that the owner, upon demand and denial, might maintain trover against the captain, without payment of the wharfage dues (1).

Nor for anything besides wharfage.

Neither can a general lien be claimed by a wharfinger for more than wharfage, and where a claim was set up for wharfage and labourage (comprising landing, weighing and delivery), and warehouse rent, it was held to be untenable, beyond the admitted right to detain for wharfage dues. "There may be an usage," observed Bayley, J., "in one place varying from that which prevails in another; but such usage should be generally known to prevail at that place, and in case any question as to the usage should arise, the wharfinger should protect himself by imposing special terms, giving notice to his employer of the extent to which he claims his lien" (2).

(1) *Syeds* v. *Hay*, 4 Term Rep. 260.
(2) *Holderness* v. *Collinson*, 7 B. & C. 212; 1 M. & R. 55, *S. C.*

GENERAL NATURE AND INCIDENTS

OF

Stoppage in Transitu.

NEARLY connected with the subject of lien, and not less practically important, is that equitable extension of the law, which is termed stoppage in transitu; or, in other words, the recognized right of a vendor, on discovery of the bankruptcy or insolvency of the party to whom he has sold goods on credit, to retake them before actual and complete delivery has been effected. The distinction between the respective rights of lien and stoppage in transitu having been already adverted to and explained in an earlier portion of the treatise, it may suffice here to recapitulate briefly, that in the one case, the power of a vendor is confined to the unpaid-for goods in his actual possession—and, in the other, to such goods as may be in transit, or in the hands of his agent, shipper, carrier, or wharfinger, with the object, and for the purpose of delivery to the vendee (1). Nature of stoppage in transitu.

The right to stop goods in transitu, though first introduced and founded in equity, has long been considered and acted upon as a legal remedy. The courts of law, admitting the justice of the right, have recognized it in constant practice, and extended a liberal aid in enabling an unpaid consignor or vendor to regain possession of property on its way to a vendee, who, from his circum-

(1) *Dixon* v. *Yates*, 5 B. & Ad. 339; 2 Nev. & M. 202, *S. C.*

stances, may not be in a condition to fulfil the terms of his contract. What was formerly a mere equitable claim is now therefore a legal possessory right (1). In its foundation, it is analogous to that of lien; but from its nature, it must be obvious, it can only be exercised in respect of the identical goods on which the claim is founded. It is not a mere lien which a vendor forfeits if he part with the possession of the goods, but grows out of his original ownership and dominion (2). The insolvency, therefore, or inability of the vendee to pay the price of the goods sold, vests in the vendor a power to exercise the inherent rights of ownership; and the conditional right to possession in the former, can only be rendered absolute by payment, or, what is equivalent to payment, tender of such amount; but, after such payment or tender, the goods cannot be detained for sums due on prior or other accounts (3).

General rule of law, as to property passing by sale.

The general rule of law is, that where there is a sale of goods, and nothing is specified as to delivery or payment, although every thing may have been done so as to divest the property out of the vendor, and to throw upon the vendee all risk attendant upon the goods; still there results to the vendor out of the original contract a right of re-seizure and retention, until payment of the price (4).

Original recognition of right of stoppage in transitu.

The earliest instance found of the recognition of this right in a court of equity is in the case of *Wiseman* v. *Vandeput* (5), decided in the year 1690. The benefit which was expected to result to trade from the allowance

(1) *Edwards* v. *Brewer*, 2 Mee. & W. 337, per Parke, B.; and see *Wiseman* v. *Vandeput*, 2 Vern. 203; *Snee* v. *Prescot*, 1 Atk. 245; *D'Aquila* v. *Lambert*, Amb. 39; 2 Eden, 75, *S. C.*

(2) *Bloxam* v. *Sanders*, 4 B. & C. 948, per Bayley, J.; 7 D. & R. 403, *S. C.*

(3) *Snee* v. *Prescot*, 1 Atk. 245.

(4) *Miles* v. *Gorton*, 2 Cr. & M. 511; 4 Tyrwh. 295, *S. C.*; *Tooke* v. *Hollingworth*, 5 Term Rep. 215.

(5) 2 Vern. 203. But the court has not jurisdiction to exercise the right of stoppage in transitu; see *Goodhart* v. *Lowe*, 2 Jac. & W. 349.

of the right, and the apparent injustice of permitting the goods of a consignor, in the event of the consignee's bankruptcy, to be applied in payment of the other creditors of the latter, induced the courts of law to follow the example of the courts of equity, and to adopt, and by a variety of decisions to establish, the right of stoppage in transitu as a legal right (1); and upon the same principles of justice, as already observed, it has since been looked upon both by courts of law and equity as a right to be favoured and encouraged (2). The judges, indeed, of our courts, have frequently expressed their regret that the laws of England were not equally favourable to the vendor of goods in this respect with those of some other countries, and lamented that goods which had been actually delivered after the consignee's bankruptcy, and were distinguishable from the general mass of his effects, should ever have been considered a part of them, or that there should have been any necessity for the numerous and nice distinctions which have been made, as to the continuance and determination of the transitus (3). Such distinctions have, however, been at all times acted upon by the courts, and it is only by so distinguishing between an actual or constructive delivery, and a delivery for certain purposes only, that they have established and supported the power of a vendor to retake possession of the goods sold, during their transit to the vendee (4).

By whom right may be exercised.

All persons standing in the relation of vendor and vendee, or consignor and consignee, on a sale or consignment of goods on credit, may exercise the right of stop-

(1) *Ellis* v. *Hunt*, 3 Term Rep. 469, per Buller, J.; *Hodgson* v. *Loy*, 7 Term Rep. 440; *Lickbarrow* v. *Mason*, 6 East, 25, *in notis*; *Dixon* v. *Baldwin*, 5 East, 175; *Oppenheim* v. *Russell*, 3 Bos. & Pul. 42, per Heath, J.

(2) *Northey* v. *Field*, 2 Esp. Rep. 613; *Scott* v. *Pettit*, 3 Bos. & Pul. 469; *Hammond* v. *Anderson*, 1 New Rep. 69.

(3) *Snee* v. *Prescot*, 1 Atk. 245; *Inglis* v. *Usherwood*, 1 East, 515; *Neate* v. *Ball*, 2 East, 117; *Scott* v. *Pettit*, 3 Bos. & Pul. 469.

(4) *Oppenheim* v. *Russell*, 3 Bos. & Pul. 42.

page in transitu. And there are cases in which the law recognizes this right, though the contract under which the goods have been consigned may not be literally a contract of sale(1). Hence, where a factor or agent, by the order of his principal, purchases goods for him, and consigns them to him on credit, with an additional charge on account of commission, making himself liable to the original vendor in the first instance, and no privity exists between such vendor and the principal, the factor or agent is so far considered as the vendor of the goods to the principal, as to be entitled to stop them in transitu, upon the insolvency or bankruptcy of the latter, though he may not, perhaps, be considered as standing in that relation for all purposes. Nor is this right divested though the trader may have previously accepted bills drawn upon him, by his agent, for the amount of the goods; for such acceptances amount, at most, to part payment for the goods, which, as shown hereafter, is no defeasance of the right(2).

Mere liability to pay price of goods, as surety, vests no right.

But a mere liability to pay the price of goods, by one who has become surety for the purchaser, does not entitle him to the exercise of the right, in case of the purchaser's insolvency; for there exists no primary liability for the price of the goods as in the instance last mentioned, so as to constitute the required relation of vendor or consignor(3).

Right may be exercised by vendor's agent.

Stoppage exercised by a particular agent, or by a general agent, not particularly authorized (if the act of the latter be afterwards recognized and confirmed by his principal), will be as valid as if made by the consignor himself. But a stoppage by a third person, who at the

(1) *Snee* v. *Prescot*, 1 Atk. 245; *D'Aquila* v. *Lambert*, Amb. 399; 2 Eden, 75, *S. C.*; *Newsom* v. *Thornton*, 6 East, 17; 2 Smith, 207, *S. C.*; *Inglis* v. *Usherwood*, 1 East, 515; *Bohtlingk* v. *Inglis*, 3 East, 381.

(2) *Feise* v. *Wray*, 3 East, 93.

(3) *Siffken* v. *Wray*, 6 East, 370.

time is not an agent of the consignor, and has received no authority from him for so doing, will not be sufficient, though the act of such person be afterwards adopted and approved of by the consignor; and to render a resumption by the consignor or his agent, effectual in law, it must be effected with an intention of stopping the goods in transitu, and adversely to the consignee; and if it be made under an amicable agreement with the latter, to sell the goods, and apply the proceeds in discharge of bills drawn by the consignor for the price, it will be wholly invalid against the assignees of the bankrupt consignee (1).

Right of consignor against factor.

In every instance, where goods are sent in the way of sale, the party to whom they are sent is liable to pay; but till he has paid, in case of his failure, the owner may stop them in transitu. An evident and reasonable distinction exists between payment and a mere liability to pay; and hence, if a factor, in consideration of goods consigned to him, have accepted bills drawn by the consignor, paid part of the freight, and become insolvent before the bills are due, and before the goods have reached his actual possession, the consignor's right still attaches (2).

Against consignee, being also joint consignor.

So, if a consignor purchase goods on the joint account of himself and another, and consign them to the latter to be disposed of for their mutual benefit, he so far acquires the character and rights of a vendor, as to entitle himself to the power of resuming possession of them, in case of the bankruptcy or insolvency of the latter during their transit (3).

Against money remitted for a particular purpose.

A party, remitting money on a particular account, and for a particular purpose, may stop it, on its way to the consignee, in case of his insolvency; but no such right

(1) *Feise* v. *Wray*, 3 East, 93.
(2) *Kinlock* v. *Craig*, 4 Bro. P. C. 47; 3 Term Rep. 119—783.
(3) *Newsom* v. *Thornton*, 6 East, 17; 2 Smith, 207, *S. C.*

exists in the case of a general remittance in payment, or on account of a debt from a debtor to his creditor (1).

Alien enemies entitled to right of stoppage in transitu, where vendee has purchased under license from the crown.

Alien enemies, trading with British subjects, who purchase under license from the crown, have been held to be entitled to the rights of purchasers under ordinary circumstances. Such license from the crown, to British merchants to send a ship in ballast to an enemy's port, there to receive and load a cargo, and import it into this country, by legalizing the purchase by the subject, legalizes the sale by the enemy, and impliedly legalizes the vendor-enemy's right to stop the goods in transitu, after their arrival in port here, upon the intermediate insolvency of the vendees, after a part payment only (which is offered to be refunded), and also to employ an agent here for that purpose; and such agent having possessed himself of the goods, the assignees of the bankrupt vendees cannot recover from him the value of them in trover (2). "The crown," observed Lord Ellenborough, C. J., in delivering judgment, "does not give to any man a roving commission to steal from or defraud even its enemies of their property: if it authorize a subject to buy goods from an enemy, it must be taken to authorize the enemy to sell them. The alien enemy, therefore, has a right to stand in court as defending a legal contract, for the sale of his goods, authorized by the King's license, with the power incident to such a contract: and I should be ashamed to be the subject of a country which should be so base as to hold out a lure to aliens to sell their property to its own subjects, and then enable the vendees, as soon as the property was thus brought within their grasp, to seize and apply it to their own use, without paying the owners for it."

Transferree of bill of lading from vendor

The transferree of a bill of lading by endorsement, from the vendor of goods, who has ascertained, whilst

(1) *Smith* v. *Bowles*, 2 Esp. Rep. 578.
(2) *Fenton* v. *Pearson*, 15 East, 419.

they are in the hands of the wharfinger, that the purchaser, to whom they had been originally consigned, has stopped payment, having received directions from the vendor to take possession of the goods, and accordingly demanded them from the wharfinger, has been held to have a sufficient special property therein to enable him to maintain an action of trover; on the ground that the right of stoppage in transitu by the vendor, was not at an end when the demand was made (1). entitled to right.

In order to constitute a valid right to the exercise of stoppage in transitu, the debt, in respect of which the power is claimed, must be subsisting and unpaid; though the precise amount may not have been ascertained. Accordingly, where a merchant in England sent goods of a given value to a merchant at Quebec, for sale on his account, and before the goods were sold, and the proceeds ascertained, the latter shipped three cargoes of timber to the former, to credit in account—two of which arrived—and against the third, the consignor drew a bill for the amount, whilst it was in transitu; and in the interval, the consignee dishonoured the bill, and became insolvent; it was held, that the consignor had a perfect right of stoppage in transitu, and was not bound to wait until the mutual accounts between him and the consignee were finally adjusted (2). There must be an existing debt due for the price, to authorize stoppage, though precise sum not known.

But if, on the other hand, the state of the accounts between the parties be such that, on the whole, the vendor is indebted to the vendee, he cannot on the insolvency of the vendee, stop in transitu property of less value consigned to the vendee, on account of the balance; and if the balance due from him have arisen from acceptances given for his accommodation by the acceptor, his right of stoppage is, notwithstanding, suspended till payment of the bills (3). If vendor indebted to vendee on general account, no right exists.

(1) *Morison* v. *Gray*, 9 Moore, 484.
(2) *Wood* v. *Jones*, 7 D. & R. 126.
(3) *Vertue* v. *Jewell*, 4 Camp. 31.

Agreement to accept composition for debt, operates as abandonment of right.

A composition taken by the vendor for a debt on the insolvency of the vendee, in preference to an exercise of his right of stoppage in transitu, thereupon, amounts to a direct waiver and abandonment of his privilege. Thus, where a wine-merchant, having possession of a butt of sherry, which he had sold to a customer who subsequently compounded with his creditors, became a party to the deed of composition for a general debt, including the price of the wine in question, and declined to take back the wine, stating that the customer might have it delivered at any time, on payment of duty, it was held, that he was bound by such promise, and that under the circumstances, he could not avail himself of the doctrine of stoppage in transitu (1).

Stoppage in transitu may be exercised by a mere claim.

The right of stoppage may, in some cases, be exercised effectually by a mere claim to the goods during their transit, without an actual seizure by *corporal touch*. Thus, where a claim was advanced by the agent of a consignor to a quantity of wine which had been consigned to an insolvent vendee, and on non-payment of duties, removed into the King's warehouse, pursuant to the statute authorizing a seizure and sale in such case, and no actual possession could consequently be acquired by the consignor; the claim was held sufficient in law to prevent the proceeds of the wine from being distributable under a commission of bankruptcy issued against the consignee. The courts, observed Lord Kenyon in delivering judgment, had, of late years, leaned much in favour of the power of the consignor to stop his goods in transitu, and it was a leaning in furtherance of justice; and though Lord Hardwicke had been of opinion, that in order to stop goods in transitu, there must be an actual possession of them obtained by the consignor, before they come into the hands of the consignee, that rule had been since relaxed; it was then held, that actual possession was not necessary—that a

(1) *Nichols* v. *Hart*, 5 Car. & P. 179.

claim was sufficient, and to that rule he subscribed.—In the case before the court, his Lordship continued, the bankrupt had no title to the actual possession until the duties were paid; until then, they were *quasi in custodiâ legis;* before the sale, the agent for the consignor claimed and endeavoured to get possession, and that was a sufficient stoppage in transitu, in his opinion, to secure the rights of the consignor (1).

Or, by notice to carries not to deliver to vendee.

A notice to a carrier, during the transit of goods, not to deliver them to the vendee, operates in like manner as a valid exercise of the right of stoppage, and though the goods be, notwithstanding, delivered by mistake, the sale is nevertheless rescinded; for it is clear, that after such notice, the carrier becomes liable in trover, in case of delivery, and it would be monstrous to say, that the delivery of them by mistake, under such a liability, was a confirmation of the property in the vendee (2).

Right dependent upon duration of transit.

The first, and principal question to be determined in every inquiry into the extent of the vendor's power, is necessarily the duration of the transit of the goods sold; for it is during such period only, as expressed by the technical phrase adopted, that the right of a vendee is defeasible by re-seizure and detention of the property.

General rule as to extent of transit.

As a general position, it may be considered that in all cases of the sale and transmission of goods, the transitus is at an end when the property comes either into the actual possession of the vendee, or to that place where, by his authority, it is destined for his use, or to await his orders, where, *in fine*, there is nothing further to be done with the property, until a re-sale has taken place, or it has been applied to the vendee's purposes; and where no

(1) *Northey* v. *Field*, 2 Esp. Rep. 613. A case was asked for on the part of the plaintiff and granted; but was never afterwards moved. (See *note*.)

(2) *Litt* v. *Cowley*, 7 Taunt. 169; 2 Marsh, 457; Holt, 338, per Gibbs, C. J.; *Stokes* v. *De La Rivière*, cited in *Bohtlingk* v. *Inglis*, 3 East, 397.

further change of possession is contemplated, till a further change of property has been effected (1).

Actual or constructive possession by consignee essential to determination of transitus.

But, in order to constitute a determination of the transitus, the consignee must have taken actual or constructive possession of the goods, as owner. A delivery, contrary to his directions, or subsequently to a rescission of the contract, would, notwithstanding the insolvency of the vendee, be ineffectual to defeat the right of the vendor to repossession. The intention of the consignee, at the time of receiving the goods, may therefore be tested by evidence, so as to preclude the supposition that he received them as his own. Thus where the consignee's agent or son allowed a quantity of goods to be landed at a wharf where the consignee customarily received them, without the directions of the consignee himself, the goods were still considered in transitu, on evidence being adduced to prove that the consignee had told his son at the time, that under the circumstances in which he was, he would not meddle with them; and though that fact was not disclosed to the wharfinger (2).

Transitus not ended by acceptance contrary to his orders.

Nor, by delivery at a wharf without his directions.

Consistent with the principle of this decision, though not so extensive in its application, is a subsequent judgment of the court, that the unauthorized consent of the clerk to the landing of goods at a particular wharf in the name of his master is not sufficient to divest the lien of the consignor (3). It differs, however, as will be seen, in this respect, that in the one case, the wharf where the goods were landed, was the one customarily used by the consignee; and, in the other, that it was one selected for the special landing of the particular goods, and not originally intended, or ordinarily used for that purpose.

If contract re-

The right of contracting parties to rescind an existing

(1) *James* v. *Griffin*, 2 Mee. & W. 623; and see the same case, when first before the court, 1 Mee. & W. 20.

(2) *James* v. *Griffin*, 2 Mee. & W. 623 (Lord Abinger, C.B. dissentiente).

(3) *Edwards* v. *Brewer*, 2 Mee. & W. 375; Mur. & Hurl. 132.

contract, till executed, or the rights of third parties have intervened (1), is universally admitted, when not in fraud or contravention of the bankrupt laws (2). Hence where a consignee, on the arrival of goods at a wharfinger's, repudiated the contract, stating that he would not receive them, and directed an attorney to take the necessary steps for stopping the delivery; and the attorney accordingly gave the wharfinger an order not to deliver them, which order the consignor wrote to confirm the following day; and subsequently, the goods were seized under an execution at the suit of one of the consignee's creditors; it was held, that the original contract was rescinded, and that the transitus was not ended by the arrival of the goods at the wharf, so as to deprive the consignor of the right to stop in transitu (3).

Rescinded meanwhile subsequent delivery invalid.

It is not necessary, in order to divest the consignor's right to stop goods in transitu, that they should have been taken by the very hands of the consignee himself; they may be marked, for instance, by the provisional assignee of the consignee, if a bankrupt, before arrival at the place where the consignee is in the habit of receiving them (4); and, in some cases, common carriers, packers, and wharfingers, may stand in the character of agents for the purpose of receiving or holding the goods; a delivery to whom would be equivalent to a delivery to the consignee himself.

Acceptance by consignee's assignee,

Or agent.

In the instances in which it has been said that the goods must come to the corporal touch of the vendees, in order to oust the right of stopping in transitu (5), it is

What amounts to final delivery to agent.

(1) *Salte* v. *Field*, 5 Term Rep. 211; *Atkin* v. *Barwick*, 1 Str. 165; *Harman* v. *Fisher*, Cowp. 125; *Smith* v. *Field*, 5 Term Rep. 404.

(2) See the distinction between the cases, *suprà*, & *Barnes* v. *Freeland*, 6 Term Rep. 81.

(3) *Bartram* v. *Farebrother*, 4 Bing. 579; 1 M. & P. 515, *S. C.*; and see *Mills* v. *Ball*, 2 Bos. & Pul. 457.

(4) *Ellis* v. *Hunt*, 3 Term Rep. 464.

(5) *Hunter* v. *Beale*, cited *ibid.*

a figurative expression, rarely if ever true. If it be predicated of the vendee's own actual touch, or of the touch of any other person, it comes in each instance to a question, whether the party to whose touch they actually come, be an agent so far representing the principal, as to make a delivery to him a full, effectual and final delivery to the principal, as contradistinguished from a delivery to a person virtually acting as a carrier or mean of conveyance to, or on account of, the principal, in a mere course of transit towards him. If the transit be once at an end, the delivery is complete, and the transitus for this purpose cannot commence *de novo*, merely because the goods are again sent upon their travels towards a new and ulterior destination (1).

Intermediate delivery may occur, where agent invested with power to receive.

Hence, where by arrangement an intermediate delivery occurs before the goods reach their ultimate destination, it becomes necessary to inquire whether the party to whom they are so delivered is invested with the power to receive them, and to alter their destination; or is a mere agent to see them forwarded in accordance with original directions. If clothed with a general and unlimited authority in this respect, the transitus ends on the arrival of the goods into his hands, for, as between the buyer and seller, this is the ulterior delivery in view (2). It is not merely a constructive, but an actual delivery.

Goods directed to one place prior to being shipped to another complete transit at first destination.

In accordance with this distinction, where goods were ordered of a cotton-dealer at Manchester, to be forwarded to one Metcalf at Hull, for the purpose of being shipped for Hamburg; it was held, that the goods had so far got to the end of their journey; for they then required new orders to put them again into motion; and

(1) *Dixon* v. *Baldwin*, 5 East, 184, per Lord Ellenborough, C. J.; *Jackson* v. *Nichol*, 5 Bing. N. C. 508.

(2) *Leeds* v. *Wright*, 3 Bos. & Pul. 320; 4 Esp. Rep. 243, *S. C.*; *Scott* v. *Pettit*, 3 Bos. & Pul. 469.

to communicate to them another substantive destination, or they must otherwise have continued stationary (1).

So if deposited in carrier's warehouse till removed for shipment generally.

And, where a trader in London was in the habit of purchasing goods in Manchester, and of exporting them to the continent soon after their arrival in London, but having no warehouse there, the goods consigned to him usually remained in the waggon-office of the carriers, until they were removed for the purpose of being shipped, the court held, that this constituted the termination of the transit (2), for thenceforward it was at the option of the vendee to send them wherever he thought proper. And inasmuch as, in such case, the vendor's right of stoppage ceases with the termination of the transit, it follows, in reason, that his right is in no manner kept alive by the fact that the carrier detains the goods in respect of a claim of lien (3).

Notwithstanding lien claimed by carrier.

So, if deposited till sale effected by consignee.

A long series of cases might be cited, were it necessary, in confirmation of the established doctrine that, if a man be in the habit of using the warehouse of another, whether that of a carrier or wharfinger, as his own, making it the depository of his goods, and disposing of them there, the transitus terminates with the arrival of the goods at such depository (4). This must, however, be understood as extending only to those instances where a delivery into the warehouse has been perfected, or the consignee has obtained a full control over the goods, prior to his insolvency. The mere arrival of a ship at a wharf, without any delivery of the goods out of the hold of the ship, is not enough to constitute a termina-

Arrival of a ship at wharf without goods being unloaded or

(1) *Dixon* v. *Baldwin*, 5 East, 175; and see *Wright* v. *Lawes*, 4 Esp. Rep. 82; *Noble* v. *Adams*, 7 Taunt. 59; 2 Marsh, 366; Holt, 248, *S. C.*

(2) *Rowe* v. *Pickford*, 8 Taunt. 83.

(3) *Allan* v. *Gripper*, 2 Cr. & J. 218; 2 Tyrwh. 218, *S. C.*; but such lien would operate to keep the transitus alive, if claimed before actual delivery; see *Crawshay* v. *Eades*, 1 B. & C. 181; 2 D. & R. 288, *S. C.*; *post*, p. 376.

(4) *Richardson* v. *Goss*, 3 Bos. & Pul. 127; *Scott* v. *Pettit*, *ibid.* 469; *Morley* v. *Hay*, 3 Man. & Ry. 396.

claimed by consignee, no determination of transitus.

tion of the transit, even though the wharf be customarily used by the consignee as the depository of the goods shipped to his direction. The following case, in which this point was fully argued and determined, came on before the Court of Common Pleas, upon a motion to set aside an award.

Messrs. Wilkinson & Co. having purchased for one Gilbert twenty-five sacks of flour, at their own expense, charging a commission only, and not a profit, shipped them, with the remainder of a cargo of other goods, by a vessel named the "Cumberland," bound for London. The vessel was consigned to the wharf of one Humphrey, and a manifest of the cargo sent to him by post. At the same time, an invoice of the goods was sent to Gilbert, stating them to be bought and shipped for him, and at his risk. It appeared, that when a ship was thus consigned by Messrs. W. & Co., to Humphrey's wharf, a manifest of the cargo was usually sent, by post, and in this manifest the different items of the cargo and their marks, &c. were inserted, and opposite to each item, either the name of the consignee, or the words "to order," were written. When such vessel arrived at the wharf, those goods for which the consignee's name was annexed to the manifest were delivered to the consignee or order, upon application; and those, to which the words "to order" were opposite in the manifest, were delivered to the order of W. & Co., that is to say, to persons producing either bills of lading for the goods, or W. & Co.'s invoices of them. Flour, thus appearing to be shipped to order by the manifest, was always left on board the vessel, and not landed, until such bill of lading or invoice was produced; but if no such bill of lading or invoice was produced by the time the vessel began to take in her return cargo, then the flour was landed and placed in the warehouse of Humphrey, and there kept to the order of the shippers. Gilbert, who

afterwards became bankrupt, had been in the habit of having flour shipped for him from Stockton, and sent to Humphrey's wharf; and in such cases always either sold it on board before it was landed, or it was landed and kept for him in the warehouse, until he sold it; so that Humphrey's wharf was invariably deemed the place of its destination. The twenty-five sacks in question were shipped on the 5th day of April, 1824, and arrived at the wharf on the 12th, but were not landed until between the 22nd and 26th of the same month. Meanwhile, viz. on the 17th, an order from W. & Co., directed to Humphrey, requiring him to deliver the sacks to Messrs. Atkinson and Cramp, was produced to Humphrey by Cramp, and the flour claimed on behalf of W. & Co. Gilbert had committed an act of bankruptcy on the 10th day of April, 1824. On the 14th a commission of bankruptcy had issued against him, and on the 19th, the messenger under the commission produced to Humphrey the invoice of the twenty-five sacks of flour in question, which had been sent by W. & Co. to Gilbert, as before mentioned, and demanded the flour, but it was refused. Messrs. A. & C. subsequently landed the flour, and it was sold on the account of W. & Co. The court, under these circumstances, held, that there had not been such a delivery to, or application made by, the consignee, as to deprive the consignors of the right of stoppage in transitu, and that they were therefore entitled to the possession of the flour, under the claim made on their behalf by Atkinson and Cramp (1).

A mere commencement of delivery not perfected by possession, no termination of transit.

Again, a mere commencement of delivery, not so far completed as to enable the consignee to take actual possession, cannot be construed into a determination of the transit. Thus, where a quantity of iron was delivered to

(1) *Tucker* v. *Humphrey*, 4 Bing. 516; 1 M. & P. 378 (n).

a carrier to be conveyed to a vendee in the country, and the carrier having reached the vendee's premises, landed a part of the iron at his wharf, but finding that he had stopped payment, reloaded the same on board his barge, and took the whole of the iron to his own premises; it was held, that there was no delivery of any part of the iron so as to divest the consignor of his right to stop in transitu; the special property remaining in the carrier until the freight for the whole cargo was either tendered or paid, or until he had done some act showing that he assented to part with the possession of the goods without payment of the freight (1).

In the cases so far referred to, it will be seen that the destination of the goods has been either temporarily completed by delivery to an agent, uninvested with any directions as to their further transit, or the warehouse in which they have been deposited has been so customarily adopted by the vendee, as to render the warehouseman a mere agent for the specific object of receiving and preserving them for the convenience of the vendee.

If agent invested with specific directions as to destination, transitus only ends at such destination.

If an agent be merely clothed with a specific and limited authority to forward the goods to a particular destination, the transitus is not at an end until the goods have reached the place named by the buyer to the seller as such destination; for in that case, the warehouse of the agent is a mere resting-place for the goods. Accordingly, where goods were purchased by a commission agent at Manchester by the direction of merchants at Lisbon, to be there sent to them, and the latter having no warehouse in Manchester, the vendor delivered the goods to the commission agent, who was to forward them as ordered, the court held, that the transitus continued until they reached Lisbon, the place named by the vendee to

(1) *Crawshay* v. *Eades*, 1 B. & C. 181; 2 D. & R. 288, *S. C.*

the vendor as the place of their ultimate destination; and that the latter had a right to stop them in the hands of the agent on the insolvency of the vendee (1).

And if goods in the course of their journey reach the hands of an agent, thus confined to a particular order of destination, the case will not be varied by the circumstance that he has paid the dues or carriage. As, where an agent at Southampton acting under a general authority from Le Conteur, a draper at Guernsey, to forward to him there all goods which arrived to his direction at Southampton, received, in consequence, a quantity of goods, upon which he paid the carriage and the wharfage dues, and selected the ship by which he forwarded the goods; it was held, that the transit was not ended at Southampton, but that the vendor might stop them after they had been put on board the vessel for Guernsey (2).

And in such case, payment of dues or intermediate carriage, will not determine transitus.

But, where goods have been furnished to a party as agent of another, who has become bankrupt, and on his own credit, he may protect himself by stopping them in transitu, and giving to them a direction adverse to his principal (2). In such case he is substantively the purchaser, with all the rights, during the transit of the goods, incidental to such character; but if the goods reach the ultimate destination pointed out by the principal, every subsequent act must be considered in the character of, and in furtherance of his duty as agent (3).

But if agent have purchased goods on his own credit, he may stop them in transitu, and give them new destination.

The delivery to an agent may be also rendered incomplete, by conditions annexed by the vendor at the time of the delivery. Thus, although, upon an absolute delivery of goods to a packer of a purchaser, who has no warehouse of his own, the transit is in general at an end, yet if the goods be delivered to him upon the understanding

Conditional delivery by vendor to vendee's agent, for ready money.

(1) *Coates* v. *Railton*, 6 B. & C. 422; 9 D. & R. 593, *S. C.*; and see *Smith* v. *Goss*, 1 Camp. 282.

(2) *Nicholls* v. *Le Feuvre*, 2 Bing. N. C. 81; 1 Hodges, 255, *S. C.*

(3) *Hawkes* v. *Dunn*, 1 Cr. & J. 519; 1 Tyrwh. 413, *S. C.*

that they are to be paid for in ready money, he becomes a trustee for the vendor, and it would be a contravention of duty to deliver them to the purchaser till paid for accordingly (1).

Or sale to vendee; something requiring to be previously done by vendor.

So where a purchaser agrees to buy certain goods, as, for instance, articles of plate, and the price is agreed upon, but the goods are not to be delivered till the vendor has got them engraved at his own expense; a delivery to the engraver for that purpose is not a delivery to the purchaser, so as to defeat the vendor's right of stopping the goods in transitu, on the failure of payment, or dishonour of the notes with which payment has been made (2).

Right of purchaser to take possession of goods before journey completed, formerly denied.

It was formerly ruled, that a completion of the journey was necessary to defeat the right of a vendor to re-seize goods on non-payment of the price, and insolvency of the purchaser. Thus, in the following case:—One Holst, who was a merchant living at Leghorn, consigned a cargo of fruit to Dutton & Co. at Liverpool, by a ship chartered on their account. The captain signed three bills of lading as usual, one of which was sent to Dutton & Co. Before the ship arrived at Liverpool, Dutton & Co. became bankrupts. On the ship's arrival at Liverpool, she was ordered to perform quarantine; and during the quarantine, one of the assignees of Dutton & Co. went on board the vessel, claimed the cargo as belonging to Dutton & Co.'s estate, opened some of the chests of oranges, and put two persons on board, who continued there till the quarantine was ended, with a view of keeping possession of the cargo. A few days afterwards, but before the expiration of the quarantine, Holst's agent served a notice of Dutton & Co.'s bankruptcy on the captain of the vessel, and claimed the goods on behalf of

(1) *Loeschman* v. *Williams*, 4 Camp. 181; *Goodhall* v. *Shelton*, 2 H. Bl. 316.

(2) *Owenson* v. *Morse*, 7 Term Rep. 64.

Holst. A similar notice was served on the assignees; and when the vessel came into the harbour, a claim was again made to the captain, and an indemnity offered to him by Holst's agent; but he delivered the goods to Dutton & Co.'s assignees, against whom Holst having consequently brought an action of trover to recover the goods, they contended, that the principal's right to stop in transitu, was completely at an end when the consignee had got possession, by any means, of the goods consigned: that the consignee might have met the vessel at sea on her voyage, and have taken possession by virtue of the first bill of lading, which possession, they contended, would be complete to divest any right the consignor might have to stop the goods in transitu. But Lord Kenyon was of opinion, that this was a stopping in transitu sufficient to maintain the action; his Lordship said, that in order to give the consignee a right to claim by virtue of possession, it should be a possession obtained by the consignees, *on the completion of the voyage;* that the case put, that the consignee had a right to go out to sea to meet the ship, could not be supported, as it might go the length of saying, that the consignee might meet the vessel coming out of the port, from whence she had been consigned, and that that would divest the property out of the consignor and vest it in himself; which was a proposition not to be supported, as there would be then no possibility of any stoppage in transitu at all. That in the present case, the voyage was not completed till she had performed quarantine, till which time she was in transitu; and as Holst's agent had given notice, and claimed the cargo before the completion of the voyage, he was of opinion, that Holst had stopped the goods in time enough to prevent the property from vesting in the assignees (1).

In a later case, however, Lord Alvanley expressed him- Contrary decisions.

(1) *Holst* v. *Pownal*, 1 Esp. Rep. 240.

self to be directly opposed to the doctrine laid down by Lord Kenyon. "If," said his Lordship, in delivering the judgment, "in the course of the conveyance of the goods from the vendor to the vendee, the latter be allowed to exercise any act of ownership over them, he thereby reduces the goods into possession, and puts an end to the vendor's right to stop them. So, though it has been said, that the right of stoppage continues until the goods have arrived at their journey's end, *yet if the vendee meet them upon the road, and take them into his own possession, the goods will then have arrived at their journey's end with reference to the right of stoppage*" (1). The reporter of this case seems to think that a distinction might be made between goods sent by sea and goods sent by land, as the captain undertakes by the bill of lading to deliver the goods at a particular place. But there does not appear to be any sufficient ground for such a distinction; for the carrier by land seems to be equally bound to deliver the goods at the place to which they are directed, and an action would lie as well against him for a mis-delivery as against the captain of a vessel; and the reason assigned by Lord Kenyon in *Holst* v. *Pownal*(2) (that if the vendee were allowed to take possession of the goods at any time during the journey, he might entirely defeat the right of stoppage), applies with the same force to cases of carriage by land, as to those of carriage by water. And in conformity with this opinion of Lord Alvanley, Chambre, J., in his judgment in the case of *Oppenheim* v. *Russel*(3), says, "Perhaps the consignee himself may intercept the goods in their passage; and indeed I have little doubt but that if he do intercept them in their passage before the consignor has exercised his right of stopping in transitu, and do take an actual delivery from the car-

(1) *Mills* v. *Ball*, 2 Bos. & Pul. 461; and see *Wright* v. *Lawes*, 4 Esp. Rep. 84.
(2) 1 Esp. Rep. 240.
(3) 3 Bos. & Pul. 42.

rier *before the goods get to the end of their journey*, such a delivery to him will be complete" (1). And again, in the most recent of the cases in which this point has received the consideration of the court, the opinion of Lord Kenyon would appear to be repudiated, where a *bonâ fide* ownership is shown to have been exercised by the purchaser meanwhile (2).

Goods ordered to a particular destination, may be previously taken possession of by vendee.

It is not therefore a necessary consequence that because, when a person orders goods to be delivered at a particular place, the transitus continues in general, till they have been delivered accordingly, the vendee or consignee may not under any circumstances anticipate the delivery. For instance, if before the goods reach their ultimate destination, he direct a postponement of their delivery, or do any act equivalent to taking actual possession of them, the transitus may be previously determined. Thus taking samples from the whole stock, and directing the carrier to keep the goods in his warehouse till he receives further directions, constitutes the carrier the consignee's warehouseman; and his possession is as much the possession of the consignee as if the latter had taken the whole bulk into his own warehouse (3).

Mere delivery order, unless acted upon, will not defeat right of vendor against original vendee.

It has been already observed, in treating on the right of vendors to a lien upon chattels sold, that in order to divest such right, against an immediate vendee, not only a clear and undoubted right of possession, but an actual transfer of the goods sold, must have taken place; and the like observation is applicable in reference to the power of stoppage in transitu: thus, though by the peculiar custom of a place, the sale of goods lying in a warehouse is effected by handing over a delivery order to the vendee, which is consequently deemed tantamount to actual

(1) Whit. on Lien, 206.

(2) *Foster* v. *Frampton*, 6 B. & C. 107; 9 D. & R. 108; 2 Car. & P. 469, *S. C.*

(3) *Foster* v. *Frampton*, *suprà*.

delivery, and entitles the holder of the order to obtain credit with a purchaser, as having possession of the goods; yet such delivery order does not operate, as between the original parties to the sale, to divest the lien of the vendor (1), till something amounting to actual possession has been acquired by the holder of the order. Nor can a second vendee of a chattel stand in a better situation than his vendor, if no valid and legal transfer of the articles purchased have been effected. Hence, where a sale had taken place between the vendor and immediate vendee of a quantity of rum lying in the warehouse of the former, which the vendee subsequently sold to a third party, taking his acceptances for the payment, and giving him an invoice specifying the marks and numbers of each puncheon, but declining to give a delivery order except for a portion, which was duly delivered; a sale by the latter to sub-vendees of the remaining part, will not prevent the right of the vendor attaching for the price due. Nor will the vendee's authority to the sub-vendees to mark and gauge the casks so sold, alter the rights of these parties, unless given with the concurrence of his own vendor. The circumstances may, in fact, be such as to negative the intention of the vendor to vest possession in the purchaser, and in this case, such intention is manifest in the refusal of the vendor to follow up the invoice by an order for actual delivery (2).

Nor is right divested against sub-vendees, if no valid transfer previously made to original vendor.

But though, as between vendor and vendee, justice requires that the latter shall not have the goods purchased till the price be paid, yet, as between the original vendor and a purchaser from the vendee, where the latter has paid the full price for the goods, it is equal justice that he shall have possession of the goods, if

But otherwise if vendors have sanctioned sub-sale.

(1) *Townley* v. *Crump*, 4 Ad. & Ell. 58; 5 Nev. & M. 606; 1 Har. & W. 564, *S. C.*

(2) *Dixon* v. *Yates*, 5 B. & Ad. 313; 2 Nev. & M. 277, *S. C.*; and see *Craven* v. *Ryder*, 6 Taunt. 433; 2 Marsh, 127; Holt, 100, *S. C.*; *Small* v. *Moates*, 9 Bing. 592.

the first vendor have done any thing which can be considered as sanctioning the sale by his vendee; for the right of stoppage in transitu is an equitable right to be exercised only before the goods get actually into the possession of the vendee, and when the exercise of it does not interfere with the rights of third persons. Where, therefore, A. by contract sold to B. a quantity of tallow then lying at a wharf, at so much per cwt., and the same day gave a written order upon the wharfinger to weigh, deliver, transfer, and re-house the same, and B., in pursuance of a contract to sell tallow to C., obtained from the wharfingers, and gave to C. a written acknowledgment that they had transferred the tallow to his account, and that he would be liable to the charges from a given date; and B. then stopped payment, whereupon A. gave notice to the wharfingers not to deliver the tallow to B.'s. order; it was held, in an action of trover by C. against the wharfingers, that after their acknowledgment that they had transferred the tallow to C.'s account, they held it as his agents, and that they therefore could not set up as a defence, the right of A. to stop in transitu (1).

And where certain vendors, the defendants in an action of trover, had sold a quantity of timber, then lying at their own wharf, to D., for bills, payable at a future day: which timber was then marked by D., and a small part of it was forwarded by the defendants to one place, and part to another; and then D., before the time of payment arrived, sold the whole to the plaintiff, who notified such sale to the defendants, and was answered, that it was very well; and then in the presence of the defendants, the plaintiff marked all the timber lying at their wharf, and afterwards marked that which had been forwarded to the other two stages; it was held that the defendants, after such assent to the transfer, and such

(1) *Hawes* v. *Watson*, 5 B. & C. 540; 4 D. & R. 22; R. & M. 6, *S. C.*; and see *Gosling* v. *Birnie*, 7 Bing. 339.

marking by the plaintiff, could not retain or stop any of the timber as in transitu, upon the subsequent insolvency, before the day of payment, of D. the original vendee, to whom payment had been made by the plaintiff; whatever question there might have been as between the original vendors and vendee (1).

Charge of rent for warehouse by vendor, amounts to transfer,

A charge and acceptance of rent by a vendor, for warehouse room, subsequently to a purchase of goods, amounts to a complete transfer so as to vest possession in the purchaser, and enables him to re-sell to another party, as effectually as if the goods were removed to his private depository (2), but otherwise, when the charge is made pursuant to the original arrangement, as part of the terms of purchase, and there is no intervention of claim by a third party (3).

Except when charged as part of price.

Distinction between delivery orders, invoices, &c., and dock warrants for goods in bond.

An obviously clear distinction exists between delivery orders or invoices, as between the original vendor and vendee, of goods lying in a private warehouse, and dock warrants to receive goods in bond (4). In the latter case,

(1) *Stoveld* v. *Hughes*, 14 East, 308; and see *Green* v. *Haythorne*, 1 Stark. Rep. 447.

(2) *Hurry* v. *Mangles*, 1 Camp. 452; and see *Wright* v. *Lawes*, 4 Esp. Rep. 82; *Elmore* v. *Stone*, 1 Taunt. 458.

(3) *Miles* v. *Gorton*, 2 Cr. & M. 504.

(4) In the consideration of every question relating to the transfer of goods, and the effect of documents professing to convey the title to specified property, it will be necessary to refer to the provisions of the Factors' Act, 6 Geo. 4, c. 94, (see page 266, *ante*). By the second section, (which has a general application,) it is enacted, "That any person or persons intrusted with, and in possession of any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true owners of the goods, wares, and merchandize, described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares, and merchandize, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or per-

the only recognized right of possession or property in the bonded goods is in the holder of the warrant, and the delivery of that document affords therefore the strongest proof of an actual and absolute ownership (1). Such cannot be said to be the operation of an invoice or delivery order. By these the right of ownership may pass, but, till acted upon, the possession remains, as before, in the vendor himself.

Transfer of dock warrants to purchaser of goods, bars the right to stop.

Hence, the warrants of the West India Dock Company have been held to be negotiable like bills of lading, and when endorsed for a *bonâ fide* consideration, to be equivalent to a delivery of the goods in the company's warehouse. Nor was the fact that the warrants had been obtained from the vendor by a fraudulent payment, deemed sufficient to vary the rights of the sub-purchasers, who had acquired the warrants by actual payment (2).

Order to a wharfinger to deliver goods, assented to by him, amounts to transfer.

But besides the symbolical possession of goods which may be afforded by delivery of bills of lading or dock warrants to purchasers, they may be substantially clothed with virtual possession of property by a mere delivery order to a carrier or wharfinger in whose possession it may happen to be, notwithstanding no actual transfer be in consequence made in the books; provided that such parties have signified their assent to the direction given (3).

sons, body or bodies politic or corporate, upon the faith of such several documents, or either of them: Provided such person or persons, body or bodies politic or corporate, shall not have notice, by such documents, or either of them, or otherwise, that such person or persons so intrusted as aforesaid, is, or are not the actual and *bonâ fide* owner or owners, proprietor or proprietors, of such goods, wares, or merchandize so sold, or deposited, or pledged as aforesaid; any law, usage, or custom to the contrary thereof, in anywise notwithstanding."

(1) *Spear* v. *Travers*, 4 Camp. 251.

(2) *Zwinger* v. *Samuda*, 7 Taunt. 265; 1 Moore, 12, *S. C.*; *Keyser* v. *Suse*, Gow, 58; *Barton* v. *Boddington*, 1 Car. & P. 207.

(3) *Lucas* v. *Dorrein*, 7 Taunt. 278; and see *Stonard* v. *Dunkin*, 2 Camp. 344; *Tucker* v. *Ruston*, 2 Car. & P. 86.

Unless something necessary to be done previously.

But if any thing remain to be done with the goods antecedently to their delivery—for example, weighing, measuring, or ascertaining the price, or identity—such directions will not supply the place of actual transfer, so as to divest the right of the vendor to stop them in transitu, on the insolvency of the purchaser (1).

Effect of shipment of goods on board a vessel chartered by buyer.

The question of transitus is one of more frequent occurrence in those cases where goods are shipped on board a vessel chartered by the buyer, than in almost any other. The effect of a charter-party, whether it vests in the charterer the entire and uncontrolled possession of the ship, or only amounts to a letting or employment of her for a specific purpose or adventure, has been already discussed at great length in the earlier portion of this treatise (2). The rules and decisions there pointed out, in treating on the subject of lien, are of equally practical importance in enabling a right understanding of the law of stoppage in transitu. If the ship be unequivocally demised for a term, and the sole control, management, and possession of her, be transferred to the charterer, no difficulty or doubt presents itself, and a delivery of goods into the ship is necessarily construed as a delivery to the charterer. But if, on the other hand, a restricted right only be vested in the charterer, enabling him to use a furnished vessel as a medium of carriage to a particular destination, amounting only to a temporary hiring, the property, and control, and possession of the vessel, will be considered as continuing in the owner, and a

(1) *Withers* v. *Lyss*, 4 Camp. 237; Holt, 18, *S. C.*; *Busk* v. *Davies*, 2 M. & S. 397; *Wallace* v. *Breeds*, 13 East, 522; *Hanson* v. *Meyer*, 6 East, 614; 2 Smith, 670, *S. C.*; *Simmonds* v. *Swift*, 5 B. & C. 857; *Rugg* v. *Minett*, 11 East, 216; *Austen* v. *Craven*, 4 Taunt. 644; *White* v. *Wilks*, 5 Taunt. 176; *Shepley* v. *Davis*, 5 Taunt. 617; but see *Tansley* v. *Turner*, 2 Bing. N. C. 151, where a transfer of trees, sold at a certain sum per cubic foot, held valid, each tree having been measured, but the aggregate contents not having been ascertained.

(2) See *ante*, p. 301, tit. "Ship-owners."

delivery of goods into the vessel will not, in such case, be deemed a delivery to the charterer, who has purchased them.

The solution of the difficulty that will constantly arise in the consideration of this question, can alone be afforded by the terms and provisions of each particular charter-party. Great nicety of judgment is requisite in distinguishing the operation of these instruments. No prescribed form is essential to their validity, and though in some, express and unequivocal words denote the intention of the parties too obviously to excite a doubt, in others the ambiguous terms are such as to leave us only those rules to which allusion has been made, to guide us in the interpretation of their effect.

It is, perhaps, to be lamented, that the courts have not assigned to agreements of this nature the same fixed and binding construction which they have applied to contracts respecting the conveyance of landed interest. Enveloped in doubt and uncertainty—framed in indistinct phraseology—and varying in their form and terms —it cannot be a matter of surprise, that questions as to the construction of charter-parties should be of such frequent occurrence. A stringent application of the law, which gives to certain legal expressions in the transfer of landed property a legal and uniform definition, it may be objected, would be injurious in the determination of mercantile contracts, which are often hastily, and, of consequence, inartificially expressed; and such objection, it is true, has considerable force in the construction of most agreements of that nature. The effect of a charter-party is, however, analogous to that of a lease of real estate, or a mere demise or letting of a house; the intent and meaning of which are defined by words of uniformly recognized operation. No necessity would seem, therefore, to exclude the rule of construction from the one case, which is applied to the other. The uncertainty of

the mode of interpretation adopted in this branch of mercantile law, has doubtless increased legal disputation amongst merchants—multiplied the questions of difficulty that would otherwise have arisen, and tended to relax that care and nicety of expression which should be employed in the framing of all commercial contracts. The effect of charter-parties is, at present, purely inferential. The operative words of the instrument may, as already observed, import a clear and unambiguous meaning (1), yet the context must be weighed with the greatest nicety to gather the intention of the parties, and if inconsistent (as, for instance, with terms of demise), a more limited construction will be applied in the interpretation of its general effect (1). So, on the other hand, words of less extensive operation, enlarged by subsequent stipulations in the same contract, have received a wider construction than justified by the bare operative expressions of the parties (2).

These cases, conflicting occasionally, but, at all times, affording difficult and perplexing distinctions, have been already cited and commented upon in a former portion of the book (3). It is not now, therefore, necessary to recapitulate the numerous decisions upon the subject. Enough has been said to illustrate the relation resulting from contracts of affreightment, under which the rights and remedies of parties are as frequently brought into dispute in the exercise of the power of stoppage in transitu as in that of lien: for possession is the criterion of the right in each case. If, on the one hand, the merchant or consignor have divested his ownership, by delivering the goods sold into the custody of the buyer, by depositing them for conveyance in a ship of which the latter

(1) *Christie* v. *Lewis*, 2 B. & B. 410; 5 Moore, 211, *S. C.*

(2) *Newberry* v. *Colvin* (in error), 1 Cr. & J. 192; 7 Bing. 190, overruling *Colvin* v. *Newberry*, 8 B. & C. 163; 2 Man. & Ry. 47.

(3) See *ante*, p. 301.

has not only the occupancy, but uncontrolled temporary possession, it is clear, that the transitus is effectually determined, and the power of re-seizure for the unpaid price of them is at an end; so, on the other hand, the goods of the charterer no longer remain subject to the owner's right of lien for the hire of the ship, if the former be invested by actual demise with clear and unfettered possession of the ship.

Arrival of goods by ship in port, no termination of transit, if ship subsequently ordered into quarantine.

Where a cargo is consigned, and before the ship's arrival the consignee becomes a bankrupt, the arrival of the ship in the port, where she is taken possession of by the assignees, but from whence she is ordered out to perform quarantine, is not such a completion of the voyage as to vest the property in the assignees, but the consignor may still consider the goods as in transitu, and stop them while the vessel is performing quarantine (1).

Effect of bill of lading transmitted by consignor to consignee.

The operation of a bill of lading, transmitted by a consignor to a consignee, on the sale of goods, is to vest in the latter the property consigned, subject only to defeazance in case of his insolvency and non-payment of the price; or on non-performance of any condition precedent of the actual delivery. During the transit of the goods, or, at least, until a valid transfer of the bill of lading has been effected by the consignee (which is treated of hereafter), the consignor may resort to the right of stoppage. The exercise of the power must, however, be by virtue of his ownership as consignor; and can only be extended to secure the performance of the contract of sale, according to the original terms. Thus, where a consignor of goods abroad advised the consignee by letter, that he had chartered a certain ship on his account, and enclosed him an invoice of the goods laden on board, expressing therein that they were on account and at the risk of the consignee, and also a bill of lading in the usual form, expressing the delivery to

Vests property in consignee subject to defeazance by stoppage in transitu.

Stoppage can only be exercised according to terms of sale.

(1) *Holst* v. *Pownal*, 1 Esp. Rep. 240.

be made to order, &c., he paying freight for the goods according to charter-party; and the letter of advice also informed the consignee that the consignor had drawn bills on him, at three months, for the value of the cargo; it was held, that a property was vested in the consignee, subject to the consignor's right of stoppage in case of insolvency, and that a person, who appeared from the circumstances to have acted as the consignor's agent, but had not avowed himself as such, having obtained possession of the cargo, and paid the freight under another bill of lading, and refused to deliver it up unless the consignee would make immediate payment, could not detain it or compel re-payment of such freight, after an offer on the part of the consignee to give his acceptances according to the original stipulation (1).

Endorsement of bill of lading not indispensable to transfer of goods, if possession duly acquired.

The bill of lading is customarily made out in the name of, and endorsed to, the person to whom the goods therein mentioned are consigned (2): such endorsement is not, however, an indispensable medium of the transfer of property from the owner to the consignee (3), nor will the absence of it render defeasible an actual delivery under a bill endorsed in blank, though the consignor, for greater security, at the same time transmit a bill duly endorsed to his own agent. This position may be illustrated by the following case.

After actual

The consignor of goods abroad, upon receipt of orders

(1) *Walley* v. *Montgomery*, 3 East, 585; and see *post*, p. 393, *Ogle* v. *Atkinson*, 5 Taunt. 759; 1 Marsh, 323, *S. C.*

(2) *Renteria* v. *Ruding*, 1 M. & M. 511; and see *Davidson* v. *Gwynne*, 12 East, 381. A bill of lading signed by the master of a ship is the usual acknowledgment by him of having received goods from the shipper to be conveyed to a particular destination: under general circumstances, a freighter has no right to countermand the original order of delivery under which the master has received and signed bills of lading for the goods, without, at least, first revoking such bills of lading, or tendering a sufficient indemnity to the master against the consequences of his liability.

(3) *Meyer* v. *Sharpe*, 5 Taunt. 74.

from a correspondent here, shipped goods on account, and at the risk of the consignee, and took bills of lading from the captain, making the goods deliverable to the consignor's own order, and transmitted one of such bills unendorsed, with the invoice, to the consignee, enclosed in a letter, informing him that he had drawn upon him for the amount, which he doubted not would meet due honour, and close the account. By way of further precaution, and in order the better to secure to himself payment for the goods, the consignor sent at the same time another bill of lading, endorsed to his own agent. The goods were, however, delivered to the consignee, and on his subsequent bankruptcy, a claim was preferred and a demand made of them by the consignor's agent under the bill of lading, which had been duly endorsed. The court however held, that inasmuch as the shipment had been on account and at the risk of the consignee, the property in the goods vested in him, subject only to be divested by the consignor's stopping them while in transitu; and that upon the arrival of the goods, the consignee having obtained possession of them from the captain by the production of his unendorsed bill of lading, the property became absolute in the consignee, however wrongfully parted with by the captain without a competent authority from the shipper; and however answerable the captain might be to the shipper on that account (1).

delivery under unendorsed bill of lading, party holding bill endorsed cannot claim goods.

And in another case, where the circumstances were equivalent to an actual endorsement and delivery of the bill of lading, the consignee was again held to have sufficient authority to transfer the property consigned, so as to divest the consignee's right of stoppage. Thompson & Co. having sent goods from Ireland to London, to be sold by Eustace and Holland, their factors there, wrote

Or, where circumstances are equivalent to actual endorsement and delivery of bill of lading.

(1) *Coxe* v. *Harden*, 4 East, 211; 1 Smith, 20, *S. C.*; and see *Waring* v. *Cox*, 1 Camp. 396.

to them to insure the goods, and sent them a bill of lading not endorsed, but having the names of Eustace and Holland on the back; and being applied to by them for an endorsement, answered by letter, that if the bill of lading was not endorsed, it was a mistake, and they would send an endorsement. Upon this, Eustace and Holland sold the goods, and it afterwards happening that they were unable to pay bills drawn upon them by Thompson & Co. on the general account, one Dick paid the bills for the honour of the drawers; and knowing all their transactions, applied to them for an endorsement of the bill of lading, which they sent him, and thereupon Dick demanded the goods of the master of the ship, who refused to deliver them to him, but delivered them to the persons to whom Eustace and Holland had sold them. Upon this, Dick brought an action against the master, but Lord Kenyon ruled that the plaintiff had, under such circumstances, no right to take the goods out of the possession of the vendees of Eustace and Holland, inasmuch as the transfer had been made under proper and binding authority (1).

Or, where the goods have been shipped on account and at the risk of consignee.

So, where a consignor, having accepted an order to purchase goods for a consignee, put them on board a vessel of the latter, and sent them to him as his goods, advising him of the shipment at his risk, and on his account, and remitting him the invoice; then procured the master to sign bills of lading in blank, assuring him that it was immaterial; and drew on the consignee bills for the amount, which he transmitted to an agent, with instructions that if the consignee should not accept the bills, the agent should endorse over the bill of lading to the payee of the bills, which was accordingly done; it was held, that though the goods might have been delivered to the captain on condition of the consignee's ac-

(1) *Dick* v. *Lumsden*, Peake, 189; Abbott, *on Shipping*, 392; and see *Davis* v. *Reynolds*, 4 Camp. 267; 1 Stark. Rep. 115, *S. C.*

cepting the bills, yet that no such condition having been imposed at the time of the delivery, the delivery on board the ship was complete, and the subsequent endorsement of the bill of lading was inoperative (1).

But no property vests under bill not endorsed if conditions precedent of delivery not complied with.

But if, where the unendorsed bill of lading is transmitted to the consignee, he be informed that one endorsed is, at the same time, forwarded to another person, and it manifestly appears to be the intention of the consignor that no appropriation of the property shall take place till certain precedent conditions have been complied with, no property will vest in the consignee till compliance accordingly (2).

Bill of lading may be assigned.

A sale, perfected by delivery of a bill of lading to the purchaser, enables the purchaser to transfer his right to third parties, either in pursuance of the terms of the bill of lading itself, which is usually made for the delivery of the goods to the purchaser and his assigns, or by the custom of merchants, authorizing a transfer by endorsement.

So as, on *bonâ fide* transfer, to defeat right of stoppage.

If, therefore, a consignee obtain a bill of lading, and effect a valid and *bonâ fide* sale of the goods during their transit, for valuable consideration, and without notice on the part of the purchaser that the goods have not been paid for, it operates to divest the right of the consignor to stop them in the hands of the assignee, on the insolvency of the consignee (3). For though the contract, as between the original consignor and consignee is ambulatory till delivery of the goods, enabling meanwhile the exercise of the right of stoppage in transitu, on the part of the former, in case of insolvency; yet, as between the consignor and third persons, the delivery of a bill of

(1) *Ogle* v. *Atkinson*, 5 Taunt. 759; 1 Marsh, 323, *S. C.*

(2) *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

(3) *Wright* v. *Campbell*, 4 Burr. 2046; 1 Bl. Rep. 628, *S. C.*; *Lickbarrow* v. *Mason*, 3 Term Rep. 63; and see *Caldwell* v. *Ball*, 1 Term Rep. 105; and *Hibbert* v. *Carter*, *ibid.* 745.

lading is deemed a delivery of the goods themselves (1). To allow a contrary construction, would be to enable the consignee to make the bill of lading an instrument of fraud. Nor does policy or public convenience require that it should be otherwise. "If it should be thought so," observed Mr. Justice Buller, in his elaborate judgment in *Lickbarrow* v. *Mason* (2), "I beg leave to say, that in all mercantile transactions, one great point to be kept uniformly in view is, to make the circulation and negotiation of property as quick, as easy, and as certain as possible. No man would be safe either in buying or lending money upon goods at sea, if an assignment of them by bills of lading to a third person for valuable consideration, were not to operate as a valid transfer. That species of property would be locked up; and many a man, who could support himself with honour and credit, if he could dispose of such property to supply a present occasion, would

(1) But see *Akerman* v. *Humphrey*, 1 Car. & P. 53, cited in *Tucker* v. *Humphrey*, 4 Bing. 522, where a *shipping note* is distinguished from a bill of lading, and held not to amount to a delivery.

(2) 3 Term Rep. 63. This case first came on upon a demurrer to evidence, on which there was a judgment for the plaintiff, the Court of King's Bench holding, that though the vendor of goods might, as between himself and the vendee, stop them in transitu to the latter in case of his insolvency, not having paid for them; yet, if the vendee, having in his possession the bill of lading endorsed in blank by the vendor, before such stopping in transitu, endorse and deliver it to a third person for a valuable consideration, and without notice of the non-payment, the right of the vendor to stop in transitu is thereby divested as against such *bonâ fide* holder of the bill. This judgment was reversed upon a writ of error in the Exchequer Chamber, where it was considered that a bill of lading was not a negotiable instrument, the endorsement of which passed the property *proprio vigore*, like the endorsement of a bill of exchange, though, to some purposes, it was assignable by endorsement, so as to operate as a discharge to the captain, who made a delivery *bonâ fide* to the assignee, 1 H. Bl. 357. The latter judgment was, in its turn, reversed in the House of Lords, in T. T. 33 Geo. 3, and a *venire facias de novo* directed to be awarded by B. R. 5 Term Rep. 367, and 2 H. Black. 211. The ground of that reversal was, that the demurrer to evidence appeared to be informal on the record. MS. See Mr. East's note to the report of the case, 2nd vol. p. 19.

receive a check, which industry, caution, or attention could not surmount. If the goods are, in all cases, to be liable to the original owner for the price, what is there to be bought? There is nothing but the chance of the market; and that, the buyer expects as his profit on purchasing the goods, without paying an extra price for it."

Assignee of bill of lading must have acted honestly.

It becomes, however, material to inquire whether the purchaser has acted fairly and honestly, or with a design to deceive and defraud. If the assignee of the bill of lading know at the time that the goods have not been paid for by the original vendee (1); or he collude with him to obtain possession of the goods without paying for them; or, on the arrangement for the sub-purchase, he agree to put himself into the same situation as the original purchaser, and pay for the goods, or become jointly interested in the proceeds of them (2), the assignment will be obviously fraudulent, and will deprive the vendor of his right to stop the goods in transitu, on failure of the consignee, without payment.

If goods are to be paid for at a future day, knowledge of the non-payment on assignee's part, or that purchaser has given bill for amount, will not invalidate assignment.

But in order to prevent the assignee of the bill of lading from taking the goods, it should appear that the consignor, by the terms of his dealing with the consignee, has bargained for, or expected that the payment should precede the assignment of the bill of lading. If a future payment be the arrangement, it is neither unfair in the consignee to assign, nor in the purchaser to accept the assignment of the bill of lading; but if the purchaser assist in contravening the actual terms of sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith, it is otherwise. Thus, although he may know that the consignor has not received money in payment for his goods,

(1) *Wright* v. *Campbell*, 4 Burr. 2046—2050; *Vertue* v. *Jewell*, 4 Camp. 31.

(2) *Salomons* v. *Nissen*, 2 Term Rep. 674.

but has taken the consignee's acceptance payable at a future day, not yet arrived, his present legal title will prevail against the contingent right of the consignor. But, if he know that the consignee is, at the time, in a state of insolvency, and that no bill has been accepted by him for the price of the goods, or that, being accepted, it is not likely to be paid, the interposition of himself between the original consignor and consignee, in order to assist the latter to disappoint the just rights and expectations of the former, is an act done in fraud of the consignor's right to stop in transitu, and therefore unavailable to the party taking the assignment of the bill of lading (1).

Assignee of bill takes subject to any special endorsement, or condition.

So, if there be a special endorsement on the bill of lading, importing a condition; for instance, that the goods are to be delivered to J. S., provided he pay a certain draft, every endorsee takes the goods subject to the condition, and ought therefore to inquire whether it has been fulfilled (2).

Bill of lading may be pledged by consignee, so as to divest, *pro tanto*, consignor's right of stoppage.

Having seen that the transfer of a bill of lading, by way of sale, made without notice of such circumstances as render the bill of lading not fairly and honestly assignable, will prevent the consignor from exercising, to any extent, the right of stoppage in transitu, it may be observed, that a pledge of the bill of lading may be also made by the consignee so as to divest, *pro tanto*, the like right (3). The legal right of the vendor is, under such circumstances, defeated, but he still retains the power to resume his interest in the goods on the insolvency of the vendee, by exercising it in equity on the residue which may remain after satisfying the pledgee's

(1) *Cuming* v. *Brown*, 9 East, 506; 1 Camp. 104, *S. C.*; and see *Slubey* v. *Heyward*, 2 H. Bl. 504.

(2) *Barrow* v. *Coles*, 3 Camp. 92.

(3) Vide *ante*, p. 261, et seq., as to the statutory power of factors in like cases.

claim. And if the goods comprised in the bill of lading be pledged along with other goods belonging to the pledger himself, the vendor has a right to have all the pledger's own goods appropriated to the discharge of the pledgee's claim, before any of the goods comprised in the bill of lading are so; as appears by the following case.

But if pledged with other goods of consignee, the latter may be first appropriated to discharge of pledge.

A person of the name of Westzinthus shipped at Leghorn twenty-three casks of oil, on account, and by the order of, Lapage and Co. at Liverpool, and transmitted to them a bill of lading. Before the arrival of the oil, Lapage and Co. endorsed the bill of lading, and deposited it with Hardman and Co., who advanced money on it, having previously advanced loans on other goods, the property of L. and Co. On the arrival of the oil, L. and Co. having previously become bankrupt, and Westzinthus not having been paid for it, his agent demanded it of the master of the ship, but the latter delivered it to Hardman and Co., who afterwards sold the goods of Lapage and Co., as well as the oil of Westzinthus. The net proceeds of the goods belonging to Lapage and Co. were sufficient to satisfy the debt due from them to Hardman and Co., who paid themselves their debt, and deposited the net proceeds of the oil with a third person, to abide the event of the award of an arbitrator, to whom all disputes between Westzinthus and the assignees of Lapage and Co. were referred. The arbitrator having stated the above facts on his award for the opinion of the Court of King's Bench, it was held, that Westzinthus, the unpaid vendor of the oil, had, at the time when his agent claimed it, no right to take possession, on the insolvency of Lapage and Co., because the property in, and the right to possession of it was then vested in Hardman and Co., the endorsees of the bill of lading for value; and further, that Westzinthus had not, by reason of such claim, any *legal* right to the possession of the oil, after Hardman and Co.'s lien was satisfied, but that,

in a court of equity, such transfer to Hardman and Co. would be treated as a pledge or mortgage only, and therefore, Westzinthus, by his attempted stoppage in transitu, had acquired a right to the goods in equity (subject to the lien of Hardman and Co.), as against Lapage and Co. and their assignees, who were bound by the same equities as the bankrupts themselves. And it was held, secondly, that Westzinthus, having an equitable right to the oil, subject to Hardman and Co.'s lien, had, by means of his goods, become a surety to the latter for the debt of Lapage and Co., and had therefore a clear equity to oblige Hardman and Co. to have recourse against Lapage and Co.'s own goods, deposited with them to pay their debt in ease of the surety; and all the goods, both of Lapage and Co. and Westzinthus, having been sold, he had a right to insist on the proceeds of the goods of Lapage and Co. being appropriated, in the first instance, to the payment of the debt (1).

Right of stoppage cannot be defeated by carrier's claim to a general balance against consignee.

The right of a consignor to stop goods in transitu cannot be affected by a notice from a carrier that the parties to whom goods are consigned shall not be entitled to take them out of his possession until he has paid, not only for the carriage of those goods, but all the balance he may happen to owe for the carriage of other goods (2). It is a common law right arising out of the ancient power and dominion of the consignor over his property, which, at the time of delivering his goods to the carrier, he reserves to himself, and this is paramount to any agreement between the carrier and consignee (3). That a notice published by carriers in hand-bills, or in the public papers, is to subject the goods of every man who happens to employ a carrier to the payment not only of the price of the carriage, or to any debt which he him-

(1) In *re Westzinthus*, 5 B. & Ad. 817.
(2) *Oppenheim* v. *Russell*, 3 Bos. & Pul. 42.
(3) *Ibid.* per Heath, J.

self may owe on the score of carriage to that carrier, but to the debts of another man, is so manifestly unreasonable, and so monstrous, that no legal agreement can possibly be implied from such a notice (1).

Part payment does not prevent stoppage.

It has been long and incontrovertibly established that a part payment for goods does not conclude the right of a vendor to stop in transitu; it only diminishes his claim *pro tanto* on the goods detained (2). Nor is it a consideration precedent of the vendor's or consignor's right to repossess the goods on the insolvency of the consignee, that he should tender back any bill of exchange or other security he may have received in partial payment (3), though, until such insolvency of the purchaser, or inability to meet his pecuniary liabilities, the vendor's right is necessarily suspended, by the acceptance of such securities (4).

Vendor need not tender back bill or security given, in part payment.

Part delivery may or may not divest vendor's right, according to circumstances.

The effect of part delivery has been already considered in the discussion of the law of lien (5), and it becomes unnecessary therefore to do more, in this place, than to refer generally to the cases and authorities there collected. One general and guiding rule appears to have been applied in each decision, viz. that where there are circumstances tending to show that a delivery of a portion of the articles purchased is intended as a delivery of the whole, the right of stoppage is altogether barred; but where, on the other hand, a separation of part is consistent with the contract, without implying an inchoate delivery of the entire bulk, the right of the vendor still continues upon the undelivered portion (6).

Right cannot

And lastly, it may be observed, that a vendor's right

(1) *Oppenheim* v. *Russell*, 3 Bos. & Pul. 42, per Chambre, J.

(2) *Hodgson* v. *Loy*, 7 Term Rep. 440; *Feise* v. *Wray*, 3 East, 93.

(3) *Edwards* v. *Brewer*, 2 Mee. & W. 375.

(4) *Davis* v. *Reynolds*, 1 Stark. Rep. 115. And see *ante*, p. 328, and cases there cited upon this point.

(5) Vide *ante*, p. 323.

(6) *Smith* v. *Goss*, 1 Camp. 282.

be defeated by process at suit of creditor, or by general lien of carrier.

of stoppage cannot be defeated by any claim against the consignee, whether under attachment by process out of a particular court(1), or by the claim of a carrier to a general lien for a balance due to him from the consignee(2), for the vendor's power of intercepting the goods is the elder and preferable claim.

Effect of stoppage in transitu in rescinding contract of sale.

Whether the operation of stoppage in transitu be to rescind the contract of sale, or merely to confer upon the consignor or vendor a lien for the unpaid price of goods, is a question which has been frequently adverted to, but not expressly decided(3). The solution of the point is equally important to the consignor or vendor, as to the assignees of the bankrupt or insolvent consignee or vendee. If the contract is to be considered as rescinded, the consignor may, by a resale, avail himself of a rise in the market-price of the goods; and if the market-price have fallen, the ownership of the goods will, in general, perhaps, be more advantageous to him than a mere lien as against the estate of a bankrupt or insolvent, except in cases where part of the price has been paid, and the value of the goods is an ample security for the remainder.

Cases in which a consignor may sell after a stoppage in transitu, whether the contract be considered as rescinded or not.

There is, indeed, a class of cases of frequent occurrence, in which a consignor may be considered to have a power to sell the goods, after a stoppage in transitu, independent of any right derivable from a rescission of the contract of sale: as, for instance, where goods are ordered of a specified description, and the vendor, after despatching goods corresponding with the order, stops them in transitu in consequence of the bankruptcy or insolvency of the person ordering them; he may undoubtedly sell

(1) *Smith* v. *Goss*, 1 Camp. 282.

(2) *Butler* v. *Woolcot*, 2 New Rep. 62; *Nichols* v. *Le Feuvre*, 2 Bing. N. C. 83.

(3) See *Clay* v. *Harrison*, 10 B. & C. 99; and *Stephens* v. *Wilkinson*, 2 B. & Ad. 320.

the goods so stopped, whether the contract of sale be deemed to be rescinded or still obligatory; for inasmuch as, under the circumstances supposed, before sending off the goods there is no change of property (1), and as the vendor after the stoppage has the same rights that he had before the goods left his possession, he may sell as if no contract had been entered into between him and the person ordering them. The following is an illustration of the class of cases here alluded to.

One Simeon Malleys contracted for a cargo of deals to be sent from St. Petersburgh, and chartered and sent out a vessel to bring it to Hull. The deals were shipped on board the vessel at St. Petersburgh; and an invoice and one of the bills of lading endorsed in blank were received by Malleys, who immediately thereupon accepted a bill for the amount of the invoice, which bill became due on the 24th of January, 1826. In September and October, 1825, Hubbard & Co. subscribed two policies of insurance on the deals to Malleys. The vessel was stranded and wrecked; and the insured cargo (with the exception of forty or fifty deals) was saved, but so much damaged that the captain did not think it worth while sending out a ship for them. The agent of Malleys immediately upon hearing of the loss, gave notice of abandonment to the underwriters, the day before the bill of exchange became due; the bill, when due, was dishonoured, and the goods were stopped in transitu, in consequence of Malleys' insolvency. In an action by the assignees of Malleys, who subsequently became bankrupt, upon the two policies of insurance, the interest being laid in Malleys, it was held that, after the stop-

(1) *Atkinson* v. *Bell*, 8 B. & C. 277, distinguishable from *Rohde* v. *Thwaites*, 6 B. & C. 388, by the circumstance that in the latter case, the contracting parties had mutually agreed upon the particular goods to be sold, and there had been an actual appropriation by the seller, assented to by the buyer.

page in transitu, Malleys had not an insurable interest. "The question," observed Lord Tenterden, in delivering the judgment of the court, "in this case was, whether the bankrupt had an interest in the goods insured at the time of the loss? and that depended on the effect which was to be given to the stoppage in transitu. It was argued on the part of the defendant, that its effect was to rescind the contract, and to re-vest the property in the original owners; on the other hand, on the part of the plaintiffs, it was argued that it duly restored to the owners a right of possession, and placed them in the same situation as if they had not parted with the goods. There does not appear to be any case in which the point has been decided, but we are of opinion," continued his Lordship, "that, under the peculiar circumstances of the present case, the bankrupt, after the stoppage in transitu, had no property in the goods insured" (1).

Where goods actually appropriated no right to sell unless original con-

Where, however, goods have been appropriated by the vendor and accepted by the vendee, so that a change of property has been effected (2), the vendor's right to re-

(1) *Clay* v. *Harrison*, 10 B. & C. 99. The following note is appended to the report of this case. "It appeared from the special case, that by the contract between the bankrupt and the vendors, the latter were to supply a cargo of timber. There was no bargain for any specific ascertained chattel, but the vendors were at liberty to supply any timber answering the description of that ordered; and, consequently, no property passed till the cargo of timber was appropriated by the vendors to the vendee, by the delivery on board the ship. The subsequent stoppage in transitu, supposing it had only the effect of re-vesting the possession in the vendors, and placing them in the same situation as if they had not parted with the goods, destroyed the effect of that delivery, which was the only circumstance which vested the property in the vendee; and, consequently, the property re-vested in the vendors. They then were exactly in the same condition as if the goods had always remained in their warehouse; and, in that case, the bankrupt would have had no interest in the goods: his rights, if any, would have rested *in contract merely*." In *James* v. *Griffin*, 2 Mee. & W. 623, Parke, B., states that he knows this note to be correct.

(2) *Rohde* v. *Thwaites*, 6 B. & C. 388; and see *Atkinson* v. *Bell*, 8 B. & C. 277.

sell, after a stoppage in transitu, will depend upon a dissolution of the original contract of sale. tract be dissolved.

The assent of the parties is essential to the rescission of a contract. "The rule," says Coleridge, J., in *Franklin* v. *Miller* (1), "is, that, in rescinding as in making a contract, both parties must concur." This mutual concurrence may be inferred from the acts of the parties, as well as shown by an express agreement between them. Whether one party exercises an option, reserved by the contract, authorizing him under given circumstances to rescind (2); or by some wrongful act or default (3), or by a refusal to proceed under the contract (4), compels or induces his co-contractor to declare his determination of putting an end to the agreement—in all these cases, a mutual consent to rescind is implied. The incapacity, also, of the contractor to perform his part (and a bankrupt and an insolvent are, with regard to cases in which stoppage in transitu occurs, incapable), warrants the other party (5) in withdrawing from his engagement; because either the capacity to perform is a tacit condition precedent, or the incapacity is equivalent to a default or refusal.

Assent of the parties necessary to the rescission of contracts.

What amounts to assent.

Incapacity to perform.

The case of *Litt* v. *Cowley* (6) is considered by the reporter as a direct decision that the contract of sale is rescinded by the exercise of the right of stoppage in

The case of *Litt* v. *Cowley* considered.

(1) 4 Ad. & Ell. 606; and see per Dallas, J., in *Leigh* v. *Patterson*, 8 Taunt. 540.

(2) *Towers* v. *Barrett*, 1 Term Rep. 133; and see *Masters* v. *Marriott*, 3 Lev. 363.

(3) *Giles* v. *Edwards*, 7 Term Rep. 181; *Pringle* v. *Taylor*, 2 Taunt. 150; and see *Mawman* v. *Gillett*, 2 Taunt. 325, n.; and *Moyne's case*, 5 Co. 21.

(4) *Withers* v. *Reynolds*, 2 B. & Ad. 882; see this case explained in *Franklin* v. *Miller*, 4 Ad. & Ell. 599.

(5) *Roper* v. *Coombes*, 6 B. & C. 534; *Robson* v. *Drummond*, 2 B. & Ad. 303; *Moyne's case*, 5 Co. 21.

(6) 7 Taunt, 179; see the marginal note.

transitu. In that case, the vendors of goods, who had delivered them to a carrier, seeing cause to stop them in transitu, gave notice to the carrier not to deliver them to the vendees. The carrier, however, by mistake, did so deliver them; and the vendees unpacked them and sold a part. Under a commission of bankrupt, shortly afterwards issued against the vendees, the assignees took possession of the goods, and refused to restore them to the vendors upon demand; but it was held, that the vendors might maintain trover against the assignees; Gibbs, C. J., observing that, "the law of stoppage in transitu was, that the *property* which was before in the bankrupts, might be re-vested in the seller by notice to the carrier, and that the plaintiffs having given that notice, had thereby re-vested the property."

The circumstances of the case do not infer a rescission of contract.

With regard to the case of *Litt* v. *Cowley*, before referred to, it does not appear to be requisite to assume a rescission of the contract; because, at all events, an unpaid vendor, under such circumstances as warrant a stoppage in transitu, has a special property as parcel of his original ownership, and an undoubted right of possession (which property and right of possession are consistent with the existence of the vendee's general property, and his right of possession upon payment or tender of the price), and therefore may maintain trover under the circumstances of that case.

Arguments against the rescission of contract in case of stoppage.

Against the supposition that a rescission of the contract of sale is a consequence of stoppage in transitu, it may be urged that the right of an unpaid vendor to stop in transitu is of equitable origin, and should not be pressed further than to effect those purposes of substantial justice for which it was originally introduced into equity, and adopted in the courts of common law; and that those purposes will be effected by considering it as "an equitable lien"(1). Lord Kenyon has, indeed, distinctly de-

Dicta of different judges.

(1) *Hodgson* v. *Loy*, 7 Term Rep. 445.

nied that this right proceeds on the ground of rescinding the contract (1); and other judges, in remarking on the relative rights of vendor and vendee, after a stoppage in transitu, speak of the vendor as possessing a lien (2). In *Edwards* v. *Brewer* (3), Parke, B., designates the right to stop goods in transitu as "a legal possessory right; the effect is the same," observes his Lordship, "as if the consignor had not delivered them on board the ship. Then if so, he has a right to retain them till payment of the whole price; notwithstanding part payment, he has a lien on the whole of the goods for the rest of the price."

Where part of the price has been paid.

Again, the supposition of a rescission of the contract is not easily reconcileable with the cases in which it has been held that the right to stop goods in transitu exists, notwithstanding part of the price has been paid (4); and that an action for goods bargained and sold is maintainable after the exercise of the right, if the vendor offer to deliver the goods upon being paid for them (5). The judgment of the court, in *Bloxam* v. *Sanders* (6), delivered by Bayley, J., whilst it shows that *trover* is not maintainable by the assignees of a bankrupt vendee against the vendor of goods which have been retained by the vendor and resold by him, is yet inconsistent with the proposition that the bankruptcy of the vendee warrants the vendor in rescinding the contract, or in treating it as absolutely rescinded. "If the seller," says his Lordship, "has dispatched the goods to the buyer, and

(1) *Hodgson* v. *Loy*, 7 Term Rep. 445.

(2) *Feise* v. *Wray*, 3 East, 93.

(3) 2 Mee. & W. 375.

(4) *Hodgson* v. *Loy*, 7 Term Rep. 440; *Feise* v. *Wray*, 3 East, 93; *Edwards* v. *Brewer*, 2 Mee. & W. 375, where it was decided that a bill given by the vendee need not be tendered back before or upon a stoppage in transitu. *Langfort* v. *Tiler*, 1 Salk. 113.

(5) *Kymer* v. *Suwercropp*, 1 Camp. 109.

(6) 4 B. & C. 948.

insolvency occurs, he has a right, in virtue of his original ownership, to stop them in transitu. Why? Because the property is vested in the buyer, so as to subject him to the risk of any accident; and his insolvency, without payment of the price, defeats that right. And if this be the case, after he has dispatched the goods, and whilst they are in transitu, *à fortiori*, it is so when he has never parted with the goods, and when no transitus has begun. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act upon their right of property if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, a special action may be brought against him for the injury sustained by such wrongful sale, and damages are recoverable to the extent of that injury" (1).

Transfer of bankrupt's and insolvent's contracts to the assignees.

In conclusion, it may be added, that the assignees of a bankrupt or insolvent have the option of adopting or rejecting the contract of sale, on payment of the price agreed upon, so as not to oblige the vendor to come in, as another creditor, merely for a dividend. In this view the assignees may insist upon the performance of the contract according to its terms, or rescind it by declining to confirm it.

(1) See same point, *Wilmshurst* v. *Bowker*, 5 Bing. N. C. 541; and see *Gordon* v. *Harper*, 7 Term Rep. 9.

APPENDIX.

THE following cases have received the judgment of the court since the portions of the subject to which they respectively relate were sent to the press. One of them only has appeared in any recognized report; for the others, I am indebted to the kindness of friends who have furnished me with such notes, as to enable me to append them in this place, and to embody a reference to them in the general index.

LIEN.

Property held as a lien cannot be taken in execution.

The case of *Legg* v. *Evans* (cited *ante*, page 48, note (3)) decided in the Court of Exchequer, Hil. Term 1840, has been since reported in vol. 6, Mee. & W. 36.

Special plea of lien not necessary in actions of *trover*.

The case of *White* v. *Teal*, Q. B. Trin. Term 1840, has confirmed the observations offered (*ante*, page 49) in reference to the requisite plea, where a right of lien is offered as an answer to an action of *trover*; and it would appear to be now satisfactorily established that evidence of a right of lien is not admissible under the plea of "not guilty;" and that the proper plea to render such a defence available is a denial of the plaintiff's right of possession.

Shifting lien, under contract permitting qualified possession and user by person against whom lien claimed; where such possession continues on bankruptcy.

The next case, *Hawthorn* v. *Newcastle-upon-Tyne and North Shields Railway Company*, Q. B. East. Term 1840, has been already referred to (*ante*, page 62) as awaiting the consideration of the judges, and the effect of the decision is to confirm, and, in some measure, to extend the principles applied in *Crowfoot* v. *London Dock Company*, 2 Cr. & M. 637, which decided that a lien might exist under contract upon chattels of which a bankrupt, at the time of his bankruptcy, retained possession, if such possession were in pursuance of an arrangement under which he had a mere right of user for the purposes of the contract.

The plaintiffs were the assignees of R. Robson and J. P. Robson, bankrupts, and the defendants were directors of the Newcastle-upon-Tyne and North Shields Railway Company, incorporated under an act, 6 W. IV. c. 76 (local and personal). After the passing of this act, R. Robson, with the consent of J. P. Robson, who was his partner, entered into an agreement with the company, for the construction of a bridge over the railway, and large powers were thereby given to the company as to the rejection of the materials to be used. In the deed of agreement a covenant was contained, that R. Robson, the bankrupt, would forthwith begin, and in an expeditious and workmanlike manner, erect and finish the bridge agreeably to certain plans, and would find and provide, at his own expense, all scaffolding, machinery, tools, &c. for executing and performing the work; and that if, in the opinion of the surveyor of the company, Robson should not proceed with sufficient expedition in the performance of the work, it should be lawful for the company to employ additional workmen to complete the works, on giving seven days' notice of their intention so to do. That, thereupon, it should be lawful for the company to use and employ cranes, and other materials, which, for the time being, should be

employed by Robson in or about the works, and whatever extra expense might be thereby incurred by the company in completing the works contracted to be performed in a proper manner, and with proper expedition, should be defrayed by Robson.

A further covenant provided that the company should have a lien upon such machines, implements, and materials, as should, for the time being, be *in or upon the lands or grounds whereon the bridge was to be built*, as a security for the completion of the works by the indenture contracted to be performed.

After the execution of the above-mentioned indenture, and before their bankruptcy, the Robsons proceeded with the bridge, and divers tools, &c. were deposited upon the bridge at Willington Dean, and adjoining lands, for the purpose of being used and worked up in the construction of the bridge. The company's engineer attended the work frequently—the superintendent was there constantly—and the former occasionally directed where the goods and chattels were to be put down, and his directions were attended to. He also interfered when bad materials were laid down, but made no objections when goods of the bankrupts were taken away. Besides the bridge at Willington Dean, the bankrupts were also employed in other public works at the Brandling Junction Railway, in the county of Durham. In these works the defendants had no interest or concern, but the bankrupts, on some occasions, removed to them implements and materials which had been brought to Willington Dean without any interference on the part of the defendants or their servants; and it appeared, that no schedule had been preserved of the goods and chattels originally brought to the bridge by the bankrupts. The bankrupts proceeded with the works till the 31st of July 1837, when a fiat of bankruptcy was awarded, and the bridge being left unfinished, was proceeded with by de-

fendants. On the 30th of September following the plaintiffs were appointed assignees of the bankrupts.

At the time of the bankruptcy, the goods and chattels which had been furnished for the erection of the bridge were lying in various places—part upon the actual line of railway, being the absolute property of the defendants purchased by them under the powers of the act—another portion upon land adjoining, and upon each side of the railway, and enclosed by the defendants within rails, but not the property of the defendants, having been merely taken possession of, under a provision of the act, for the purpose of depositing thereon the materials used in constructing the railway and bridges—and the remaining portion upon the line of a temporary railway made by the bankrupts over private lands for the purpose of conveying the building materials from the river Tyne to the bridge.

The question submitted for the consideration of the court was, how far sufficient possession was vested in the defendants, to enable them to exercise the lien mentioned in the deed; and the court held, that such possession continued in the defendants so long as the materials, &c. remained upon any place necessarily occupied in the construction of the bridge—that the defendants were therefore entitled to a lien, *in the nature of a shifting lien*, upon such materials as happened, for the time being, to lie either upon the actual line of railway, or upon the adjoining land in their possession, but that the lien did not extend to such portion as lay upon the temporary line, or other land not in their occupation —nor to the materials removed by the bankrupt prior to his bankruptcy.

Lien on funds under equitable assignment.

In addition to the cases cited in relation to the equitable assignment of funds in the hands of a third party

(*ante*, page 84), may be mentioned that of *Hutchinson* v. *Hayworth*, 9 Ad. & Ell. 375, of which the following are the particulars.

An equitable assignment or appropriation of funds is not revoked by bankruptcy of assignor before actual payment.

One Hunt, a manufacturer, had been accustomed to consign goods by the agency of Messrs. O. & Co. commission merchants, to houses in America, for sale, on his account, and the latter made advances to him on the consignments, received the proceeds as his agents, and accounted to him, repaying themselves their advances and other charges. In 1831, Hunt being indebted to O. & Co. for such advances and charges, and likewise owing £5,000 to his bankers, wrote to O. & Co. authorizing them, after repaying themselves their balance out of the net proceeds of H.'s shipments down to that date, to pay R. & Co., the bankers, half the remainder of such proceeds, so that it did not exceed the sum of £5,000. O. & Co. thereupon wrote to the bankers, engaging, agreeably to H.'s authority, to pay them a proportion of the remaining proceeds, after liquidating their own balance, in consideration that the bankers would guaranty them from the claims of any other party, in consequence of such payment. The bankers accordingly wrote, accepting the engagement, and agreeing to give the required guarantee. A few days previous to this correspondence, H. had transmitted to O. & Co. a letter of authority resembling that subsequently sent, and had seen the draft of a letter from them to the bankers, like the one afterwards sent, claiming a guarantee as above, but this first authority was revoked and never acted upon. In 1833, H. became bankrupt, and his assignees gave notice to O. & Co. not to make any payments out of his effects, except to themselves. Notwithstanding such notice, O. & Co. received the proceeds of the sales from the houses abroad, and paid them over to the bankers, according to the authority given, whereupon they were sued for the amount as for money had and re-

ceived to their use. Under these circumstances, it was held, either that a valid appropriation, or an equitable assignment of funds to the amount of £5,000, had been constituted in favour of the bankers, and was not revoked by Hunt's subsequent bankruptcy.

STOPPAGE IN TRANSITU.

Transitus.

The warehouse of a carrier, it has been already observed, may be so customarily used by a consignee for the deposit of his goods, as to constitute their arrival at such warehouse a determination of the transitus (see *ante*, page 373). A recent decision, *Gerard, Assignee, &c.* v. *Nightingale*, Exch. East. Term 1840, has extended the application of this rule to the case of a consignee having no warehouse of his own, but employing, according to circumstances, any carrier's warehouse at which the goods may happen to arrive. The following are such particulars of the case as I have been able to obtain.

Where a vendee is in the habit of using indiscriminately the warehouses of different carriers for deposit of goods prior to shipment, arrival at any one terminates transitus.

Goods were sold by a person at Sheffield to A., at whose request they were sent to his address, at "Faulkner Street, Liverpool," where he had a counting-house. Having, however, no warehouse for the deposit of goods consigned to him, he had, on former occasions, used the warehouses of different carriers, from whence they were carted to the docks for the purpose of shipment. It did not appear that he had ever so used the warehouse of the defendant, who had carried the goods in question; but they were taken to, and remained at his warehouse. On their arrival, the defendant sent to A. at the above address, the customary note that the goods had arrived, and remained at the defendant's warehouse at A.'s risk. Before the arrival of the goods at Liverpool, A. had absconded, and was never afterwards heard of. A fiat was

thereupon issued out against him, of which notice was given by the messenger to the defendant, and he was directed not to part with the goods. Subsequently, they were claimed by the vendor as being yet in transitu, and on an indemnity being given to the defendant, were, in consequence, delivered to him. On the trial of an action brought by the assignees of A. against the carrier to recover the goods, the jury found, amongst other things, that the defendant's warehouse was the destination intended by A. for the goods; and on a special case, stating the above facts, the court held that, under the circumstances, the transitus was at an end on the arrival of the goods at such destination.

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